

1 STATE OF NORTH DAKOTA

2 COUNTY OF RAMSEY, ss.

3 Blake Aasmundstad, et al, )

4 Plaintiffs, )

5 v. )

6 )

7 State of North Dakota, et al, )

8 Defendants. )

IN DISTRICT COURT

NORTHEAST JUDICIAL DISTRICT

Case Number 36-99-C-154

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER FOR JUDGMENT

OF DISMISSAL

9 A civil action was commenced by the plaintiffs by service of a summons and complaint  
10 on the named defendants on or about May 25, 1999. The summons and complaint was filed on  
11 June 2, 1999. On November 19, 1999 this court issued an order dismissing some claims against  
12 the state defendants and also directing that the plaintiffs amend their complaint to provide a more  
13 definite statement. An amended complaint was filed on December 9, 1999. On April 14, 2000 a  
14 motion for class action certification was filed and an order denying the same was filed by this  
15 court on September 20, 2000.

16 The first of many Rule 16 Orders was filed on August 30, 2002 together with an order  
17 bifurcating the trial. On October 1, 2003 a second amended complaint was filed and on March  
18 19, 2004 a third amended complaint was filed. On August 17, 2004 and then on September 21,  
19 2004 motions for partial summary judgment were filed by the defendants. Decisions on them  
20 were held in abeyance while additional discovery motions were addressed and supplemental  
21 briefing was allowed. An order granting partial summary judgment was filed on April 4, 2005.  
22 This decision related to issues involving to statutes of limitation.

23 In January of 2005 the defendants filed additional motions for summary judgment on  
24 other grounds. Pursuant to motion, additional time was allowed for discovery as well as  
25 additional briefing with final briefing submitted in August of 2005. On February 9, 2006 an  
26 order was issued granting in part and denying in part the motions for summary judgment. As a  
27 result of this order the Nelson County Water Resource Board, Walsh County Water Resource  
28 Board, and the Devils Lake Basin Joint Water Resource Board had all claims against them  
29 dismissed.

30 In April of 2006 both plaintiffs and defendants filed motions for summary judgment on  
31 the remaining issues. Final briefs were filed on June 1, 2006. An order denying all the motions  
32 for summary judgment was filed by the court on June 22, 2006. The issue remaining between the  
33 parties was whether the plaintiffs suffered damages or taking of their property by acts of inverse  
34 condemnation by the defendants.

1 Trial on this remaining issue commenced on July 31, 2007. Appearing for the  
2 approximately 61 remaining plaintiffs was Gary Leistico, attorney at law of Saint Cloud,  
3 Minnesota. Appearing on behalf of the State of North Dakota, State Water Commission, and  
4 State Engineer was Matthew Sagsveen, assistant attorney general for the state of North Dakota.  
5 Appearing on behalf of the defendant's Benson County Water Resource Board, Towner County  
6 Water Resource Board, Cavalier County Water Resource Board, Rolette County Water Resource  
7 Board, and the Pierce County Water Resource Board was Daniel Gaustad, attorney at law of  
8 Grafton, North Dakota and Ronald Fischer, attorney at law of Grand Forks, North Dakota.  
9 Appearing on behalf of the Ramsey County Water Resource Board was Howard Swanson,  
10 attorney at law of Grand Forks, North Dakota.

11 Trial of the action proceeded from July 31, 2006 through August 18, 2006. It was then  
12 completed with additional trial dates on September 14 and 15, 2006. Upon completion of the  
13 trial the parties ultimately agreed to first prepare a certified transcript of the trial. An order for  
14 preparation was filed on October 9, 2006. The trial transcript was completed and delivered on or  
15 about January 4, 2007. Final briefs were filed by the parties on or about April 4, 2007.

16 Having considered the evidence presented and the written arguments of counsel, this  
17 court, the Honorable M. Richard Geiger presiding, now issues the following;

#### 18 FINDINGS OF FACT

- 19 1. All of the plaintiffs in this action identified in further findings have an interest in real  
20 property located in Ramsey County and/or Benson County, North Dakota. In this inverse  
21 condemnation action they claim that the named defendants by their conduct damaged or  
22 caused a taking of their property without just compensation.
- 23 2. The North Dakota State Water Commission is an executive agency of the sovereign state of  
24 North Dakota. As set out at N.D.C.C. 61-02-01 the purpose of the commission is as  
25 follows::

26 ***61-02-01. Water conservation, flood control, management, and***  
27 ***development declared a public purpose. It is hereby declared that the***  
28 ***general welfare and the protection of the lives, health, property, and the rights***  
29 ***of all of the people of this state require that the conservation, management,***  
30 ***development, and control of waters in this state, public or private, navigable***  
31 ***or unnavigable, surface or subsurface, the control of floods, and the***  
32 ***management of the atmospheric resources, involve and necessitate the***  
33 ***exercise of the sovereign powers of this state and are affected with and***  
34 ***concern a public purpose. It is declared further that any and all exercise of***

1        *sovereign power of this state in investigating, constructing, maintaining,*  
2        *regulating, supervising, and controlling any system of works involving said*  
3        *subject matter embraces and concerns a single object, and that the state water*  
4        *commission in the exercise of its powers, and in the performance of all of its*  
5        *official duties, shall be considered and construed to be performing a*  
6        *governmental function for the benefit, welfare, and prosperity of all of the*  
7        *people of this state.*

- 8    3.    The powers and duties of the State Water Commission are set out at N.D.C.C. 61-02-14  
9        which include but are not limited to the powers and duties to investigate, plan, regulate,  
10        undertake, construct, establish, maintain, control, operate and supervise all works, dams,  
11        and projects, public and private, which may be necessary or advisable to control and  
12        regulate flood flow in the streams of the state and to minimize the damages of such  
13        floodwaters, to divert water, to improve channels of the streams for more efficient  
14        transportation of water, to develop restore and stabilize waters of the state, to promote the  
15        maintenance of existing drainage channels and to construct needed channels, to finance  
16        projects and works to provide for drainage of lands injured or subject to injury by excessive  
17        rainfall. It also includes the powers and duties to exercise full power and control of  
18        construction, operation and maintenance of works as it is defined at N.D.C.C. 61-02-02(5).  
19        The powers and duties of the State Water Commission also includes the power to acquire  
20        property by condemnation proceedings in accordance with N.D.C.C. 61-02-22 and  
21        N.D.C.C. 61-02-23.

- 22    4.    The State Engineer is an executive officer for the state of North Dakota and was created by  
23        N.D.C.C. 61-03-01. That statute states in part as follows:

24        *A state engineer shall be appointed by the State Water Commission. Such*  
25        *engineer shall be a technically qualified and experienced hydraulic engineer,*  
26        *and also shall be an experienced irrigation engineer. The state engineer shall*  
27        *serve as secretary and chief engineer of the commission. . . .*

- 28    5.    All water projects in the state of North Dakota including those related to flood control,  
29        drainage, water conservation and regulation, storage, diversion or carrying of water which  
30        are also subject to financing must be first approved by the State Water Commission in  
31        accordance with N.D.C.C. 61-21-1.-03. Further, the State Water Commission and other  
32        political subdivisions within the state, including water resource districts in the state of North  
33        Dakota are authorized to participate with each other in the development, construction,  
34        reconstruction, and maintenance of different works and projects relating to water within this

1 state. This is pursuant to N.D.C.C. 61-02-24.1.

- 2 6. Water resource districts are authorized pursuant to N.D.C.C. Chap. 61-16. Each water  
3 resource district and its board is considered a government agency and body politic as  
4 specified in N.D.C.C. 61-16-06. Further, two or more water resource districts may  
5 consolidate into a single district in accordance with N.D.C.C. 61-16-06.1.

6 The operation of water resource districts is governed by N.D.C.C. Chap. 61-16.1. The  
7 legislative intent and purpose for water resource districts is set out at N.D.C.C. 61-16.1-01  
8 which provides as follows:

9 *61-16.1-01. Legislative intent and purpose. The legislative assembly of*  
10 *North Dakota recognizes and declares that the general welfare and the*  
11 *protection of the lives, health, property, and the rights of all people of this*  
12 *state require that the management, conservation, protection, development,*  
13 *and control of waters in this state, navigable, or nonnavigable, surface or*  
14 *subsurface, the control of floods, the prevention of damage to property there*  
15 *from, involve and necessitate the exercise of the sovereign powers of this state*  
16 *and are affected with and concern a public purpose. To realize these*  
17 *objectives it is hereby declared to be the policy of the state to provide for the*  
18 *management, conservation, protection, development, and control of water*  
19 *resources and for the prevention of flood damage in the watersheds of this*  
20 *state and thereby to protect and promote the health, safety, and general*  
21 *welfare of the people of the state.*

22 *The legislative assembly further recognizes the significant achievements that*  
23 *have been made in the management, conservation, protection, development,*  
24 *and control of our water and related land resources, and declares that the*  
25 *most effective and economical method of accelerating these achievements is to*  
26 *establish water resource districts encompassing all of the geographic area of*  
27 *the state, and emphasizing hydrologic boundaries.*

- 28 7. The powers of the state's water resource districts are set out at N.D.C.C. 61-16.1-09. These  
29 powers include exercising the power of eminent domain. N.D.C.C. 61-16.1-09(2).

- 30 8. Pursuant to N.D.C.C. 61-16.1-11 two or more water resource districts may by agreement  
31 jointly or cooperatively exercise any power which is authorized by Title 61 of the North  
32 Dakota Century Code. It is further provided within that statute, that any joint water  
33 resource district that is created and its joint board is a political subdivision of the state.

34 With limited exceptions provided within the statute, N.D.C.C. 61-16.1-38 requires that

1 before any water resource district constructs any dike, dam, or device for water  
2 conservation, flood control, regulation, watershed improvement, or storage of water, it must  
3 make application for same with the State Engineer who by the statute has authority to  
4 permit or not permit the construction.

5 9. The defendants, Benson County Water Resource Board, Towner County Water Resource  
6 Board, Cavalier County Water Resource Board, Rolette County Water Resource Board,  
7 Pierce County Water Resource Board, and Ramsey County Water Resource Board are all  
8 water resource boards governing the activities of their respective water resource districts  
9 and were created pursuant to N.D.C.C. Chap. 61-16. They are separate political  
10 subdivisions within the state of North Dakota. All of these water resource districts have  
11 lands that are part of the Devils Lake Basin and drain into Devils Lake.

12 10. The plaintiffs claim that each of the defendants - State of North Dakota, State Water  
13 Commission, State Engineer, and the water resource boards named above participated in  
14 some manner in certain water projects within the Devils Lake Basin which in turn caused  
15 the plaintiffs' real properties to be damaged or taken by inverse condemnation without just  
16 compensation. These projects are those identified in Paragraph 356 of the plaintiffs' first  
17 amended complaint and are herein listed:

18 Hurricane Lake outlet channel and control structure

19 Iverson Dam removal

20 Lake Ibsen control structure

21 Mauvais Coulee improvements above Lake Alice

22 Mauvais Coulee improvements below Lake Irvine

23 Lake Irvine control structure

24 Channel improvements between Mikes Lake and Chain Lake

25 Calio Coulee channel improvements above Chain Lake

26 Grand Harbor drain and pump station

27 Starkweather channel improvements

28 Channel improvements between Morrison and Cavanaugh Lakes

29 Channel improvements between Cavanaugh and Dry Lakes

30 Dry Lake outlet channel (Channel A)

31 Ring channel on the north and east sides of Devils Lake

32 Creel Bay dike

33 It is further claimed that each project had a direct effect of increasing the amount of water  
34 flowing into Devils Lake and thereby raising the level of Devils Lake by a volume that

would not have been experienced but for these projects. (Paragraph 357 of Defendant's Complaint). Therefore, it is the plaintiffs' assertion that these projects were the proximate cause of the flooding and damages to their property entitling them to compensation under their inverse condemnation claims.

11. The body of water known as Devils Lake is the largest natural body of water in the state of North Dakota. (Defendant's Exhibit 3175). It is located between the southern boundary of Ramsey County and the northern boundary of eastern Benson County. It is located within the Devils Lake Basin.

12. The Devils Lake Basin is a geographic area contained within the northeastern section of the state of North Dakota. (See Appendix A which is p.3 of Plaintiffs' Exhibit 407. Appendix A is attached to and made a part of these findings). It is approximately 3810 square miles in size. Approximately 3320 square miles drain into Devils Lake. The remaining square miles drain into Stump Lake located east of Devils Lake. (Plaintiffs' Exhibit 337).

Devils Lake is a terminal lake and the Devils Lake Basin is a terminal basin. Devils Lake will outflow into Stump Lake at 1446.5 feet asl. However, at this point water runoff discharging into these basin lakes will not flow out of the Devils Lake Basin until reaching a water elevation of 1457 feet asl. Because this outflow of waters from the Devils Lake Basin into the Sheyenne River has not occurred in the last 1800 years, this classifies it as a terminal basin as its waters do not have an outlet to any of the oceans of the world. (Defendant's Exhibit 3024, Plaintiffs' Exhibit 417).

13. The Devils Lake Basin is made up of a number of sub basins. To the far east is the Stump Lake sub-basin which drains directly into Stump Lake. It has a drainage area of approximately 488 square miles. The other drainage sub-basins drain into Devils Lake. They are the following, including their square mile drainage area as generally recognized:

|                           |     |
|---------------------------|-----|
| Edmore Coulee             | 501 |
| Starkweather Coulee       | 391 |
| Calio Coulee              | 233 |
| Mauvais Coulee            | 882 |
| Little Coulee             | 421 |
| Comstock                  | 58  |
| Devils Lake (North Slope) | 512 |
| Devils Lake (South Slope) | 328 |

(Plaintiffs' Exhibit 337).

The square miles of these sub-basins and their drainage areas can vary depending on

1 conditions existing at that time. As noted in Plaintiffs' Exhibit 337, "Unusually large  
2 quantities of precipitation or runoff could cause some non-contributing areas to contribute  
3 runoff temporarily. So, the figures above include non-contributing areas identified in  
4 Plaintiffs' Exhibit 337. (Some non-contributing areas were not identified). But, the more  
5 current West Report assigned different area size to each sub-basin. Some differences were  
6 substantial. The West Report's assignment of square miles to the sub-basins was as follows  
7 as set out in Plaintiffs' Exhibit 463 at page 1:

|    |                                |      |
|----|--------------------------------|------|
| 8  | Edmore Coulee                  | 595  |
| 9  | Starkweather Coulee            | 320  |
| 10 | Calio Coulee                   | 129  |
| 11 | Mauvais Coulee                 | 1010 |
| 12 | Little Coulee (Hurricane Lake) | 372  |
| 13 | Comstock Coulee                | 65   |
| 14 | Devils Lake (north slope)      |      |
| 15 | )                              | 757  |
| 16 | Devils Lake (south slope)      |      |
| 17 | St. Joe *                      | 125  |

17 \*Exhibit 337 combines St. Joe and Calio Coulees.

18 A helpful map and layout of the sub-basins are displayed in Figure 2, p.4 Plaintiffs' Exhibit  
19 407. (This is marked as Appendix B and is attached to and made a part of these findings).  
20 Defendant's Exhibit 2247 also highlights these different sub-basins draining into Devils  
21 Lake. Edmore Coulee sub-basin is located primarily in Cavalier and Ramsey Counties with  
22 a small portion located in Nelson County. Starkweather Coulee sub-basin is located in  
23 Ramsey County and Cavalier County. Calio Coulee sub-basin is located in Ramsey  
24 County, Cavalier County and Towner County. Mauvais Coulee sub-basin is located in  
25 Ramsey County, Benson County and Towner County. The Little Coulee sub-basin is  
26 located in Benson County, Pierce County and Rølette County. The Comstock sub-basin is  
27 located in Benson County. The Devils Lake north slope sub-basin is located in Ramsey  
28 County. The Devils Lake south slope sub-basin is located in Benson County.

29 There are no projects claimed to have been developed in the Comstock sub-basin or in the  
30 Devils Lake South Slope sub-basin which are part of the plaintiff's claim. Hereafter, these  
31 two sub-basins will not be addressed.

- 32 14. Prior to 1979 the waters draining from the Edmore Coulee sub-basin, the Starkweather  
33 Coulee sub-basin, the Calio Coulee sub-basin, the Mauvais Coulee sub-basin, and the Little  
34 Coulee sub-basin would follow a circuitous route that would eventually find their waters

entering Mauvais Coulee and Big Coulee at some point and then entering the west bay of Devils Lake. This circuitous route was most pronounced for the waters draining from the Edmore Coulee sub-basin, the Starkweather Coulee sub-basin, the Calio Coulee sub-basin, and the Mauvais Coulee sub-basin.

Through the sub-basin coulees these waters would drain into a group of lakes known as the chain of lakes to follow this route. From east to west and following this drainage path these lakes are Sweetwater Lake, Morrison Lake, Cavanaugh Lake, Dry Lake, Mikes Lake, Chain Lake, Lake Alice, and Lake Irvine.

The waters draining from the Edmore Coulee sub-basin would drain into the Edmore Coulee and enter Sweetwater and Morrison Lake. It would then travel westerly through these chain of lakes before entering Big Coulee through a natural outlet at Lake Irvine. Likewise the waters draining from the Starkweather Coulee basin would drain through the Starkweather Coulee and enter Dry Lake. From there the waters would drain westerly through the remaining chain of lakes entering the Big Coulee at the natural outlet at Lake Irvine. Waters draining into St. Joe Coulee do so from the watershed sub-basin of the same name. However, this sub-basin is commonly recognized as part of the Calio Coulee sub-basin and is typically not treated separately. In any event, the waters of St. Joe Coulee discharge into Mikes Lake. It then moves westerly through Chain Lake, Lake Alice and Lake Irvine before it discharges into Big Coulee. The waters draining from Calio Coulee sub-basin would drain into the Calio Coulee into Chain Lake and then move westerly through Lake Alice and Lake Irvine before out letting south into Big Coulee. The waters of the Mauvais Coulee sub-basin would drain into the Mauvais Coulee which would then flow into Lake Alice and/or Lake Irvine and then from a natural outlet flow into Big Coulee. Ultimately, once these waters discharged into Big Coulee from Lake Irvine's outlet it would flow into the west bay of Devils Lake.

The waters of the Little Coulee sub-basin would drain into Little Coulee and ultimately enter the Big Coulee and depending upon the drainage area also travel through Silver Lake or Pelican Lake and then flow into the west bay of Devils Lake. Comstock Basin would also have its waters flow into the west bay of Devils Lake. (All of these findings are determined from Plaintiffs' Exhibits 337).

15. The body of Devils Lake was created by glacial activity by a unique set of circumstances. According to John B. Bluemle in his article The Origin and Behavior of Devils Lake, Defendant's Exhibit 306, the Wisconsin Glacier was advancing over eastern North Dakota approximately 12,000 years ago. It was the most recent of the glaciers covering

1 North Dakota during the Ice Age. As this glacier moved over the Devils Lake area it passed  
2 over the Spiritwood Aquifer. This aquifer was filled with groundwater. That water was  
3 pressurized. The weight of the glacier increased the pressure. This high pressure pushed  
4 the overlying earthen materials up into the advancing path of the glacier. The glacier then  
5 shoved this material a short distance to the south. Where these materials came from left a  
6 deep source depression. Had the glacier continued to advance, the depression would have  
7 been filled in and the materials that were deposited to the south would have been smoothed  
8 down. However, the glacier did not advance. It stopped. As a consequence, the range of  
9 hills to the south of Devils Lake were created and the depression or series of depressions  
10 directly to the north of those hills remained and ultimately became flooded as Devils Lake.  
11 The original Devils Lake was referred to as Glacial Lake Minnewaukan and briefly flooded  
12 areas to elevations that may have been as high as 1460 feet. At that elevation it had  
13 multiple outlets. Over time Glacial Lake Minnewaukan shrank and receded. It ceased to  
14 exist and its remnant, Devils Lake remained. In his article, Bluemle opines that Devils  
15 Lake came into existence when it dropped below 1448 feet so that Stump Lake became  
16 isolated from it. (Defendant's Exhibit 3016).

- 17 16. Several studies were done by different geologists relating to the lake fluctuations of  
18 prehistoric Devils Lake. These studies were reviewed through the testimony of Greg  
19 Wiche. At the time of trial, Greg Wiche was the Director of the United States Geological  
20 Survey North Dakota Water Science Center. His education includes a B.S. degree in 1975  
21 in geography, an M.S. degree in 1977 in geology with emphasis in water resources. Later  
22 he completed the course work for a Ph.D. in geography. Since 1983 he has been with the  
23 USGS in North Dakota. He has authored or co-authored a number of articles relating to the  
24 geology of the Devils Lake Basin and Devils Lake.

25 In a study by Warren Upham during his explorations of the Devils Lake Basin between  
26 1889 and 1894, Upham noted beach ridges significantly higher than the lake level existing  
27 at that time period. One beach strandline was about 16 feet higher than the beach then in  
28 existence. Upham noted trees above this line that were densely populated but below that  
29 line were only scattered. In addition, Upham was told by a steamboat captain who traveled  
30 Devils Lake, E. Harriman, that he had cut down what he perceived to be the thickest tree  
31 above this beach line. He then counted the rings and it had 57. So, by subtracting these  
32 rings contained in the tree trunk from the year Upham was informed the cutting occurred,  
33 he concluded that the lake was at this higher level of 1441 feet in 1830. (Plaintiffs' Exhibit  
34 407)

1 Another study noted was that by Howard Simpson. This was done in 1912 with a follow-up  
2 done in 1928. Simpson noted ice scars on trees on Grahams Island located in Devils Lake.  
3 Estimating the trees to be 80 to 100 years old, he concluded it was consistent with the last  
4 high water mark of 1441 feet in 1830 determined by Upham.

5 In 1957 another geologist, Arnow, did a study relating to beach ridges along Devils Lake or  
6 near it. Excavated areas displayed layers of different beach sediment with paleosol or  
7 ancient soil sediment sandwiched between these beach layers. This indicated periods of  
8 dryness as manifested by the paleosol layers, while the wet periods were manifested by the  
9 deposits of sand and gravel beach deposits. The highest of these beach deposits was 1453  
10 feet asl with other layers of the ancient soils stratified between these beach deposits at  
11 different levels, including one at 1446.6 feet.

12 A doctoral study by Ted Calendar was done in 1968. He took core samples of beach  
13 deposits near Creel Bay. He then used carbon dating for the beach deposits and determined  
14 that they were of approximately 1300 years in age. Above this beach deposit was another  
15 beach deposit horizon, 20 to 25 feet higher.

16 In 1991 John Bluemle dug three trenches at the Merten's farm from beach deposits he  
17 located on the farm and at the time the farmland was dry. This study is set out in  
18 Defendant's Exhibit 3015. This area was located southeast of the city of Devils Lake and  
19 just south of U.S. Highway 2. By digging these trenches Bluemle was able to reveal  
20 stratigraphic columns of deposits. Of the three trenches dug the lower trench had a surface  
21 elevation of 1447 feet asl and displayed beach deposits for several feet. Below that was a  
22 narrow layer of paleosol deposits, then another layer of beach deposits and then another  
23 layer of paleosol deposits until it reached lake clay. The two paleosol deposits of ancient  
24 soils were located between about 1440 and 1445 feet asl and were dated to be between 2150  
25 years old for the higher layer and 2760 years old for the lower layer.

26 The second trench was dug where there was a surface elevation of 1458 feet asl. There  
27 were gravel deposits on the top layer of the trench. Bluemle was uncertain whether this  
28 layer was a beach deposit. Below that was a paleosol deposit of ancient soils estimated by  
29 carbon dating to be 720 years old. Below that was additional layers of beach deposits. The  
30 lowest level of the second trench was approximately 1448 feet asl and was essentially all  
31 beach deposits up until the paleosol level at approximately 1455 feet.

32 The third trench had a surface elevation of 1457 feet asl and was dug to a level of 1446 feet.  
33 The top two and a half foot layer was beach deposit. Below that was a layer of paleosol  
34 ancient soils. This was carbon dated and determined to be approximately 1800 years old.

1 This soil deposit was approximately one foot thick. Below that was another layer of beach  
2 deposit of sand approximately one foot thick and then a thin layer of less than a half foot of  
3 lake deposits, lake clay. Finally, the last layer from about 1452 feet asl down to 1446 feet  
4 asl was glacial silt deposits.

- 5 17. Studies were also accomplished of the areas known as the Jerusalem Outlet and the Tolna  
6 Outlet. The Jerusalem Outlet is that area between Devils Lake and Stump Lake in which  
7 Devils Lake flows into Stump Lake at elevations where the waters become high enough to  
8 flow easterly into Stump Lake. The Tolna Outlet is the outlet where the waters when  
9 reaching high enough levels flow from Stump Lake into the Sheyenne River.

10 One of the earlier studies was done by John Bluemle in 1991. The study was accomplished  
11 during a dry period in the Devils Lake area. As a consequence trenching could be done in  
12 the area of the Jerusalem Outlet. From that trenching Bluemle conducted radial carbon  
13 dating of soils obtained. He concluded that Devils Lake had overflowed into Stump Lake  
14 several times to levels higher than 1446.6 feet in the last 4000 years. In fact, Bluemle's  
15 study provided conclusive data that Devils Lake had overflowed into Stump Lake in the last  
16 7000 years.

- 17 18. Edward Murphy testified at trial. At the time of his testimony he was the North Dakota  
18 State Geologist. His predecessor was John Bluemle who retired in 2004. Murphy received  
19 a B.S. degree and M.S. degree from the University of North Dakota in the field of geology.  
20 He has been with the North Dakota Geological Survey since 1977. Murphy has done  
21 several geological studies in North Dakota during his career and that includes studies of the  
22 Devils Lake Basin. He has also authored or co-authored a number of articles involving the  
23 geology of North Dakota, including the Devils Lake Basin. In 1997 Edward Murphy  
24 conducted an investigation of both the Jerusalem Outlet and the Tolna Outlet. Because of  
25 the wet conditions existing during this period of time, efforts were initiated in March of  
26 1997 while the ground was still frozen. Core holes were augured at both the Jerusalem and  
27 Tolna Outlets. Three holes were drilled at the Tolna site and eight at the Jerusalem site.  
28 The auger holes ranged from seven to twenty-six feet deep with an average depth of sixteen  
29 feet. In addition, seven trenches were also dug at the Tolna site and five at the Jerusalem  
30 site. Sediment samples were obtained from all of these different sites and studied. In  
31 addition, wood and organic materials were collected for radial carbon dating. The report of  
32 this investigation is contained and set out in detail with its appendixes in Defendant's  
33 Exhibit 3017.

34 As noted by Murphy in his report *"the Jerusalem Outlet extends for approximately 9.5*

1 miles from the eastern edge of east Devils Lake . . . to the northern edge of west Stump Lake  
2 . . . .” Most of the relatively flat channel is less than one-half mile wide but may extend up  
3 to two miles in width. Generally, the channel is approximately fifty feet below the  
4 surrounding countryside. (Defendant’s Exhibit 3017 p.8-9). According to Murphy, “*the*  
5 *Tolna Outlet is approximately 13 miles long, extending from the southwestern edge of west*  
6 *Stump Lake . . . to the Sheyenne River . . .*” (Defendant’s Exhibit 3017 p.14). The Tolna  
7 Outlet is much narrower than the Jerusalem Outlet according to Murphy and ranges from a  
8 few hundred feet wide to a thousand feet wide. (*Id* at p.14). This coulee generally lies fifty  
9 to one hundred feet below the surrounding countryside. *Id*.

10 Like other studies, sand and gravel layers were used to identify fluvial events whereas  
11 paleosols, oxidized horizons, and other matter were used to serve as indicators of dry land  
12 conditions.

13 Recognizing that an overflow from Stump Lake into the Sheyenne River would require  
14 water from Devils Lake to first overflow into Stump Lake (See Defendant’s Exhibit 3017  
15 p.20) Murphy testified that in his opinion Devils Lake overflowed into Stump Lake with  
16 certainty nine times in the last 10,000 years. In his report he also concluded that at least six  
17 times in the last 10,000 years waters from Devils Lake/Stump Lake overflowed into the  
18 Sheyenne River. (*Id*). Further, Murphy was of the opinion that these nine overflows into  
19 Stump Lake from Devils Lake were a minimum and that there was evidence of an  
20 inconclusive nature of even more overflows. All of these overflows were based upon  
21 sediment sampling and review except for the most recent overflow occurring in 1830 which  
22 was based upon historical data and fauna and flora evaluation.

23 In reaching these conclusions Murphy agreed that he was not suggesting the specific  
24 elevations in which these overflows occurred but was of the opinion that because of  
25 sediment deposits a *specific* elevation could not be determined from his and previous  
26 studies. This was due to the probability of both past deposits and erosion of sediments  
27 during the overflow process. But, that does not preclude some general conclusion from  
28 these studies described in the previous findings.

- 29 19. Based upon all the previous findings this court finds that the current flooding in the Devils  
30 Lake Basin is consistent with past geological history, the lake fluctuations of Devils Lake,  
31 and the geological history of the Devils Lake Basin. All of the properties of the plaintiffs  
32 which are a part of this action was at one time part of the Devils Lake lakebed. All of the  
33 previous studies substantiate that in the past Devils Lake on multiple occasions has been  
34 higher than its current elevation at the time of trial and on multiple occasions has been high

1 enough to overflow into Stump Lake and into the Sheyenne River.

2 20. Historical data has also shown fluctuations in the level of Devils Lake. As previously  
3 determined, in 1830 the Devils Lake was at a level of 1441 asl. No historical data was  
4 recorded from 1830 to 1867. From 1867 to 1901 levels of the lake were sporadically  
5 recorded. The lake's water level in 1867 was 1438 feet. The lake level then declined for a  
6 period of time. From 1867 to 1940 there was a gradual decline to 1400.9 feet asl. Then the  
7 lake began to rise again. From 1883 to 1890 a more rapid decline occurred down to 1425  
8 feet asl.

9 From 1901 forward, annual records were kept of the elevation of Devils Lake. The lake's  
10 decline continued until it reached a low of 1400.9 feet asl in 1940. By this time, the lake  
11 had decreased in size from 140 square miles in 1867 to 10.2 square miles in 1940. From  
12 1940 to 1956 the lake gradually climbed to 1419 feet. A substantial part of that occurred in  
13 a single year. In April of 1950 the lake was measured at 1406.62 feet asl. By May 3, 1961,  
14 it had climbed to 1415.47 feet, almost a nine foot rise in a single year. This was followed  
15 by another short period of decline and then a rapid rise to 1419.26 feet in July of 1956. The  
16 lake again proceeded to decline so that in January of 1969 it reached another low level of  
17 1410.5 feet before it proceeded to increase with a single year surge of 6.5 feet with a lake  
18 level of 1416.9 feet recorded in June of 1970.

19 The lake continued its climb from that point reaching a high of just under 1425 feet in the  
20 summer of 1976. It declined to just above 1422 feet in 1978. In 1979 it was almost 1427  
21 feet. Between that year and 1993 it fluctuated between 1427 feet and 1422.65 feet. After  
22 that it began its continued rise resulting in a peak lake level of 1449.1 feet asl on June 17,  
23 2004.

24 21. Plaintiffs' Exhibit 511 is the United States Geological Survey's gauging records of Devils  
25 Lake from 1931 to the time of trial. The figures set forth below provide an annual peak  
26 recording of the lake's elevation during that particular year. These figures reflect peak  
27 elevations during a given year and do not reflect the lake's level in each year at a particular  
28 time. The volume of acre feet is also included and is taken from Plaintiffs' Exhibit 2246.  
29 Volume is rounded to the nearest tenth.

| 30 | YEAR | ELEVATION | ELEVATION  | VOLUME    | VOLUME  |
|----|------|-----------|------------|-----------|---------|
| 31 |      | (HIGH)    | DIFFERENCE | ACRE FEET | CHANGE  |
| 32 | 1931 |           |            |           |         |
| 33 | 1932 | 1411.45   |            | 202,698   | --      |
| 34 | 1933 | 1410.79   |            | 186,304   | -16,394 |

|    |      |         |         |          |
|----|------|---------|---------|----------|
| 1  | 1934 | 1408.82 | 143,376 | -42,928  |
| 2  | 1935 | 1405.8  | 91,162  | -52,214  |
| 3  | 1936 | 1405.8  | 91,162  | --       |
| 4  | 1937 | 1402.14 | 47,415  | -43,747  |
| 5  | 1938 | 1404.0  | 68,046  | +20,631  |
| 6  | 1939 | 1402.66 | 53,554  | -14,492  |
| 7  | 1940 | 1402.66 | 53,554  | --       |
| 8  | 1941 | 1402.84 | 54,613  | +1,059   |
| 9  | 1942 | 1404.53 | 74,023  | +19,410  |
| 10 | 1943 | 1404.7  | 76,472  | +2,449   |
| 11 | 1944 | 1403.85 | 66,877  | -9,595   |
| 12 | 1945 | 1404.69 | 76,472  | +9,595   |
| 13 | 1946 | 1404.99 | 80,209  | +3,737   |
| 14 | 1947 | 1403.62 | 63,421  | -16,788  |
| 15 | 1948 | 1406.5  | 101,887 | +38,466  |
| 16 | 1949 | 1407.25 | 115,285 | +13,398  |
| 17 | 1950 | 1414.95 | 294,430 | +179,145 |
| 18 | 1951 | 1415.47 | 308,802 | +14,372  |
| 19 | 1952 | 1414.50 | 280,375 | -28,427  |
| 20 | 1953 | 1413.   | 240,076 | -40,299  |
| 21 | 1954 | 1414.36 | 277,601 | +37,525  |
| 22 | 1955 | 1416.81 | 348,016 | +70,415  |
| 23 | 1956 | 1419.36 | 436,345 | +88,329  |
| 24 | 1957 | 1418.7  | 411,138 | -25,207  |
| 25 | 1958 | 1418.27 | 397,224 | -13,914  |
| 26 | 1959 | 1417.04 | 354,316 | -42,908  |
| 27 | 1960 | 1416.15 | 329,555 | -24,761  |
| 28 | 1961 | 1415.00 | 294,430 | -35,125  |
| 29 | 1962 | 1414.3  | 274,840 | -19,590  |
| 30 | 1963 | 1413.19 | 245,283 | -29,557  |
| 31 | 1964 | 1411.78 | 209,933 | -35,350  |
| 32 | 1965 | 1411.60 | 205,095 | -4,838   |
| 33 | 1966 | 1412.92 | 237,492 | +32,397  |
| 34 | 1967 | 1412.85 | 237,492 | --       |

|    |      |         |           |          |
|----|------|---------|-----------|----------|
| 1  | 1968 | 1411.68 | 207,506   | -29,986  |
| 2  | 1969 | 1416.82 | 348,016   | +140,510 |
| 3  | 1970 | 1419.46 | 440,034   | +92,018  |
| 4  | 1971 | 1421.14 | 502,200   | +62,166  |
| 5  | 1972 | 1422.26 | 552,744   | +50,544  |
| 6  | 1973 | 1420.60 | 482,136   | -70,608  |
| 7  | 1974 | 1424.09 | 634,887   | +152,751 |
| 8  | 1975 | 1424.80 | 668,878   | +33,991  |
| 9  | 1976 | 1425.03 | 678,794   | +9,916   |
| 10 | 1977 | 1422.93 | 579,282   | -99,512  |
| 11 | 1978 | 1423.20 | 592,865   | +13,583  |
| 12 | 1979 | 1426.95 | 783,032   | +190,167 |
| 13 | 1980 | 1426.05 | 734,992   | -48,040  |
| 14 | 1981 | 1425.90 | 724,570   | -10,422  |
| 15 | 1982 | 1426.94 | 777,604   | +53,034  |
| 16 | 1983 | 1428.08 | 844,239   | +66,635  |
| 17 | 1984 | 1427.89 | 832,909   | -11,330  |
| 18 | 1985 | 1426.81 | 772,200   | -60,709  |
| 19 | 1986 | 1427.21 | 793,954   | +21,754  |
| 20 | 1987 | 1428.81 | 884,618   | +90,664  |
| 21 | 1988 | 1427.91 | 832,909   | -51,709  |
| 22 | 1989 | 1426.44 | 750,803   | -82,106  |
| 23 | 1990 | 1424.86 | 673,825   | -76,978  |
| 24 | 1991 | 1423.74 | 615,977   | -57,848  |
| 25 | 1992 | 1422.65 | 570,339   | -45,638  |
| 26 | 1993 | 1427.81 | 827,278   | +256,939 |
| 27 | 1994 | 1430.89 | 1,012,409 | +185,131 |
| 28 | 1995 | 1435.88 | 1,358,953 | +346,544 |
| 29 | 1996 | 1437.83 | 1,508,158 | +149,205 |
| 30 | 1997 | 1442.97 | 1,980,166 | +472,008 |
| 31 | 1998 | 1444.68 | 2,159,910 | +179,744 |
| 32 | 1999 | 1447.07 | 2,441,224 | +281,314 |
| 33 | 2000 | 1446.36 | 2,355,517 | -85,707  |
| 34 | 2001 | 1448.01 | 2,556,299 | +200,782 |

|   |      |         |           |          |
|---|------|---------|-----------|----------|
| 1 | 2002 | 1447.43 | 2,478,962 | -77,337  |
| 2 | 2003 | 1447.52 | 2,491,673 | +12,711  |
| 3 | 2004 | 1449.10 | 2,704,967 | +213,294 |
| 4 | 2005 | --      | --        | --       |
| 5 | 2006 | 1449.2  | 2,718,943 | +13,976  |

22. Plaintiff, **Rodney J. Brown** resides at 4288 - 93<sup>rd</sup> Avenue NE, Crary, ND 58327.

23. Rodney J. Brown owns property near or adjacent to Devils Lake in the County of Ramsey and the State of North Dakota, legally described as:

**Plaintiffs' Exhibit 665**

An undivided five-sixth (5/6th) interest in and to the following:

The South Half of the Southwest Quarter (S1/2SW1/4) and the Southwest Quarter of the Southeast Quarter (SW1/4SE1/4) of Section Six (6);

The North Half of the Northwest Quarter (N1/2NW1/4) and the Northwest Quarter of the Northeast Quarter (NW1/4NE1/4) of Section Seven (7), all located in Township One Hundred Fifty-two (152) North, Range Sixty-two (62) West; and

The South Half of the Southeast Quarter (S1/2SE1/4) of Section One (1); and the North Half of the Northeast Quarter (N1/2NE1/4) of Section Twelve (12), all located in Township One Hundred Fifty-two (152) North of Range Sixty-three (63) West, except tract deeded to Osborne, and together with approximately twenty acres adjacent to the West side of the last described premises also described as follows:

Commencing at the Northeast corner of the Southeast Quarter of the Southwest Quarter (SE1/4SW1/4) of Section One (1) in Township One Hundred Fifty-two North of Range Sixty-three West and thence South along the quarter line a distance of 1,320 feet, thence West at right angles a distance of 330 feet, thence North at right angles a distance of 1,320 feet, and thence East at right angles a distance of 330 feet to the point of beginning, consisting of ten acres more or less; and

A parcel of land commencing at the Northeast corner of the Northeast Quarter of the Northwest Quarter (NE1/4NW1/4) of Section Twelve (12), Township One Hundred Fifty-two (152) North, Range Sixty-three (63) West, thence in a Southerly direction along said quarter line a distance of approximately 1160 feet to road, thence along the road in a Northwesterly direction 330 feet, thence at right angles in a Northerly direction approximately 980 feet more or less to the North boundary of the Northwest Quarter (NW1/4) of Section Twelve (12) quarter line, thence East at right angles a distance of 330 feet to the point of beginning, consisting of eight acres more or less.

24. Rodney J. Brown's property flooded and/or otherwise damaged by Devils Lake floodwaters is approximately seventy (70) acres most of which was hay land except about 5 acres of crop

land. It has been completely flooded by and/or otherwise damaged by Devils Lake floodwaters as indicated in Plaintiffs' Exhibit 542. There are no improvements on Plaintiff Brown's property. This property initially started to flood in 1994. So, the land had a low elevation range of 1427.81 feet to 1430.89 feet. The flooding has continued to increase with the increased elevation of Devils Lake which as of the date of trial has reached 1449.19 msl.

25. **Jacob Roemmich** resides at 2501 - 14<sup>th</sup> Street West, Devils Lake, ND 58301.

26. Plaintiff, Jacob Roemmich owns property near or adjacent to Devils Lake, legally described as:

**Plaintiffs' Exhibit 698**

Lot Fifteen (15) of Walford's Main Lakeview Subdivision, located in the Northwest Quarter (NW1/4) of Section Twenty-Three (23), Township One Hundred Fifty-three (153) North, Range Sixty-five (65) West of the Fifth Principal Meridian, in Ramsey County, North Dakota, according to the plat thereof on file and of record in the office of the Register of Deeds, of Ramsey County, North Dakota.

27. Jacob Roemmich's property is completely flooded by and/or is otherwise damaged by Devils Lake floodwaters. This property initially started to flood in April 1994 when the ice went off Devils Lake, with the flooded area of the property increasing with the lake elevation until the property became completely flooded. So, the low elevation range of the property was 1428.34 feet to 1429.26 feet. Its highest elevation was less than 1449.19 feet. Additional damages to this property include lost rural water and rural sewer improvements on the property.

28. Plaintiffs, **Raymond and Carol Weed** reside at 4308 - 62<sup>nd</sup> Avenue NE, Minnewauken, ND 58351.

29. Raymond and Carol Weed own property near or adjacent to Devils Lake in the County of Benson and the State of North Dakota, legally described and contained in:

**Plaintiffs' Exhibit 705**

Lots one (1), two (2) and three (3) of section three (3), in township one hundred fifty-three (153) north of range sixty-seven (67); Lots one (1), two (2) and three (3) of Section two (2), in township one hundred fifty three (153) north of range sixty seven (67); Lots three (3) and four (4) and the north half of the southwest quarter (N1/2SW1/4) of section twenty-six (26) north of range one hundred fifty-four (154) north of range sixty-seven (67); Lots one (1) and two (2) and the west half of the northeast quarter (W1/2NE1/4), lots four (4) and five (5) and the south half of the northwest quarter (S1/2NW1/4), the east half of the southwest quarter (E1/2SW1/4), west half of the southeast quarter (W1/2SE1/4), northeast quarter of the southeast quarter (NE1/4SE1/4) and lot three (3), of section thirty-five (35), in township one hundred fifty-four

(154) north of range sixty-seven (67) all west of the fifth principal meridian.

**Plaintiffs' Exhibit 706**

Lots 1, 2 and 3 (less Parcel) 3-153-67

Lots One, Two and Three (less the following tract, E1/2NE1/4NE1/4NE1/4, further as described in document #189223) of Section Three, Township One Hundred Fifty-three, Range Sixty-seven (less 9.27 Acres Rt of Way)

Lots 1, 2, 3 (less a parcel) 2-153-67

Lots One, Two, Three (Less a parcel described as follows: NW1/4NW1/4NW1/4, further as described in document #183901) of Section Two, Township One Hundred Fifty-three, Range Sixty-seven

Lots 1, 2 and 3 35-154-67

Lots One, Two and Three of Section Thirty-five, Township One Hundred Fifty-four, Range Sixty-seven

W1/2NE1/4, S1/2 NW1/4 35-154-67

The West Half of the Northeast Quarter and the South Half of the Northwest Quarter of Section Thirty-five, Township One Hundred Fifty-four, Range Sixty-seven

E1/2SW1/4, W1/2SE1/4, NE1/4SE1/4, 35-154-67

The East Half of the Southwest Quarter, the West Half of the Southeast Quarter and the Northeast Quarter of the Southeast Quarter of Thirty-five, Township One Hundred Fifty-four, Range Sixty-seven

30. Raymond and Carol Weed's property is completely flooded by and/or otherwise damaged by Devils Lake floodwaters. These properties are highlighted in Plaintiffs' Exhibits 543 and 544 (noting that some highlighted property has been crossed off as it does not relate to the plaintiff's property). The property in Section 35 of Riggins Township initially started to flood in 1995 and continued to have additional flooding until it was completely flooded in 1997. So, this parcel had a low elevation range of 1430.9 feet to 1435.88 feet. The highest elevation of the land was no higher than 1442.97 feet. The property in Section 2 and 3 of West Bay Township began to flood in 1997 or 1998. So, the highest low elevation this parcel could have had was 1444.68 feet. The plaintiff was uncertain of the exact year it was completely flooded. All the land continued to have additional flooding until it was completely flooded at the time of trial. So, its highest elevation was less than 1449.2 feet. Additional damages to this property include loss of fences and water holes.
31. **Ardon L. Herman** reside at 5455 - 62<sup>nd</sup> Avenue NE, Minnewauken, ND 58351.
32. Plaintiff Ardon L. Herman owns property near or adjacent to Devils Lake in the County of Ramsey and State of North Dakota, with his wife Audrey Herman legally described as:

1 **Plaintiffs' Exhibit 707**

2 North Half of the Northeast Quarter (N1/2NE1/4); Southeast Quarter of the  
3 Northeast Quarter (SE1/4NE1/4); East Half of the Southeast Quarter  
4 (E1/2SE1/4); and Southwest Quarter of the Southeast Quarter (SW1/4SE1/4)  
5 of Section Eight (8); West Half of the Southwest Quarter (W1/2SW1/4) of  
6 Section Nine (9); Northeast Quarter (NE1/4); East Half of the Northwest  
7 Quarter (E1/2NW1/4); and Northwest Quarter of the Northwest Quarter  
8 (NW1/4NW1/4) of Section Seventeen (17); all in Township One Hundred  
9 Fifty-four (154) North, Range Sixty-six (66) West of the Fifth Principal  
10 Meridian, containing 600 acres, more or less, and subject to oil, gas and  
11 mineral reservations and road right-of-ways as shown of record in the office of  
12 the Register of Deeds in and for Ramsey County, North Dakota.

13 **Plaintiffs' Exhibit 708: (Minus the following property legally described**  
14 **as):**

15 The Southwest Quarter of the Southeast Quarter (SW1/4SE1/4) of Section  
16 Eight (8), in Township One Hundred Fifty-four (154) North of Range Sixty-  
17 six (66), less part deeded to the grantees previously and reserving unto the  
18 grantors, all of the oil, gas and derivatives of oil and gas which the grantors  
19 presently own in the property.

- 20 33. Ardon L. and Audrey Herman's property is completely flooded and/or otherwise damaged  
21 by the flooding from Devils Lake, as indicated in Plaintiffs' Exhibit 545. Not all of the land  
22 is under water, but it is unusable for its purpose it had prior to flooding. This is due to  
23 irregular shape, lack of access, or small amount of acreage remaining. This property  
24 initially started to flood in the Spring of 1995, with the flooding gradually increasing until  
25 the entire property was completely flooded or damaged by May of 2006. On May 1, 1995  
26 the lake's water level was at 1431.02 msl. By May 15, 1995 it was at 1434.74 feet and  
27 continued to climb. This is the range of its low elevations. All of the property is less than  
28 1449 feet in elevation. Additional damages include loss of fences.
- 29 34. Plaintiff, **Edna Kenner** resides at 301 Sunny Hills Drive South, Devils Lake, ND 58301.
- 30 35. Edna Kenner owns property near or adjacent to Devils Lake in the County of Ramsey and  
31 the State of North Dakota, with her husband Lloyd Kenner legally described as:

32 **Plaintiffs' Exhibit 696**

33 Lots Eight (8) and Nine (9) of Block One (1), Sunnyhills Subdivision part of  
34 Section Twenty-seven (27), Township One Hundred Fifty-four (154) North of  
Range Sixty-five (65) West.

- 35 36. Lloyd and Edna Kenner's property is completely flooded and/or otherwise damaged by  
36 Devils Lake floodwaters. This property initially started to flood in the spring of 1994 when  
37 the ice went off the lake, and the flooding increased every year until the lots were

1 completely flooded in 2005. Therefore, the property had a low elevation range of about  
2 1428 feet to about 1430 feet. The highest elevation of the property was less than 1449.2  
3 feet. Additional damages to this property include loss of a lot of full grown evergreens  
4 trees, and the cost of house relocation.

5 37. Plaintiff, **Ronald D. Heisler** resides at 1409 - 8<sup>th</sup> Avenue Northwest, Devils Lake, ND  
6 58301.

7 38. Ronald D. Heisler owns property near or adjacent to Devils Lake in Eagle Bend Estates,  
8 Ramsey County, with his wife Elaine F. Heisler legally described as:

9 **Plaintiffs' Exhibit 688**

10 Lot Eighteen (18) of EAGLE BEND ESTATES, Subdivision One (1), Ramsey  
11 County, North Dakota, according to the plat thereof recorded in the office of  
12 the Register of Deeds of Ramsey County, North Dakota, and recorded therein  
13 in Plat Cabinet 1, Slide 199.

14 **Plaintiffs' Exhibit 689**

15 A one-half (1/2) undivided interest in and to:

16 Lot Eighteen (18) of Eagle Bend Estates, Subdivision One (1), Ramsey  
17 County, North Dakota, according to the plat thereof recorded in the office of  
18 the Register of Deeds of Ramsey County, North Dakota, and recorded in Plat  
19 Cabinet 1, Slide 199.

20 39. Ronald D. and Elaine F. Heisler's property is completely flooded and/or otherwise damaged  
21 by Devils Lake floodwaters. This property initially started to flood in 1997 when it crossed  
22 the meander line and became completely flooded in March of 1998. This places this  
23 property at a low elevation of between 1438 feet to 1442.97 feet (1997 lake level  
24 elevations). Its highest elevation was less than 1443 feet (the high elevation in March of  
25 1998).

26 40. These plaintiffs initiated their action on or about May 25, 1999. This court has ruled that  
27 N.D.C.C. 28-01-22.2 requires that an action of this nature against the state or any of its  
28 agencies or officers must be commenced within 3 years of when the action accrued. I find  
29 that the plaintiff Ronald Heisler commenced his action for inverse condemnation against the  
30 state parties within the 3 year period. Although this plaintiff acknowledged the lake itself  
31 started to rise in 1994 or 1995, in weighing all of the evidence presented, this was not by  
32 itself sufficient notice then that the alleged taking had manifested itself as to his property at  
33 this point in time. That manifestation and damages began in 1997. Additional damages to  
34 this property include loss of rural sewer.

41. Plaintiffs **Duane J. and Pamela J. Armstrong** reside at 308 Sunny Hills Drive South,  
Devils Lake, ND 58301.

- 1 42. Duane J. and Pamela J. Armstrong own property near or adjacent to Devils Lake in Ramsey  
2 County, State of North Dakota, legally described as:

3 **Plaintiffs' Exhibit 650**

4 County of Ramsey and State of North Dakota and described as follows:

5 Lot Fifteen (15) of Block One (1), Sunnyhills Subdivision, part of Section Twenty  
6 seven (27), Township One Hundred Fifty Four (154) North of Range Sixty Five  
(65) West,

7 **Plaintiffs' Exhibit 651**

8 Plat Plan of Sunny Hills Subdivision

- 9 43. Duane J. and Pamela J. Armstrong's property is completely flooded and/or otherwise  
10 damaged by Devils Lake floodwaters. So, the property is at an elevation at the lower end of  
11 1428 feet to 1429 feet, and at the higher end of 1448 feet. This property initially started to  
12 flood in April of 1994 and the flooding gradually continued to increase until the property  
13 became completely flooded in 2002. Additional damages to this property include loss of a  
14 boat house, trees, sewer system, well, residence, the cost of house removal and concrete,  
15 landscaping and other work.

- 16 44. Plaintiffs, **Merle and Nicole Henke** reside at 2128 - 29<sup>th</sup> SW, Devils Lake, ND 58301.

- 17 45. Merle and Nicole Henke own property near or adjacent to Devils Lake in the County of  
18 Benson, State of North Dakota, legally described as:

19 **Plaintiffs' Exhibit 703**

20 Northeast Quarter (NE1/4) of Section Twenty six (26), Township One  
21 Hundred Fifty four (154) Range Sixty seven (67).

- 22 46. Plaintiffs, Merle and Nicole Henke's property has 141 acres of completely inundated land  
23 and the remaining 19 acres have been otherwise damaged by Devils Lake floodwaters  
24 because it has become so saturated it cannot be used for cattle grazing or any other purpose.  
25 This property initially became spongy in the fall of 1995. In 1996 the lake waters began  
26 flooding onto it with the flooding gradually increasing until all became unusable in 1999.  
27 This places the property at a low elevation between 1435.2 feet and 1437.83 feet and a high  
28 elevation of 1447 feet for the flooded land. It had been used for cattle grazing. Additional  
29 damages to this property include loss of fences, a well, and a water tank.

- 30 47. Plaintiff, **Lyle G. Dykhoff** resides at 717 Walnut Street East, Devils Lake, ND 58301.

- 31 48. Plaintiff, Lyle G. Dykhoff owns property near or adjacent to Devils Lake, legally described  
32 as:

33 **Plaintiffs' Exhibit 697**

34 The West One-Half (W1/2) of Lot One (1) in Block Five (5) of Cliff's  
Subdivision, a part of Lot One (1) in Section Seventeen (17), Lot Five (5) in

Section Eighteen (18), and Lot One (1) in Section Twenty (20), all in Township One Hundred Fifty-three (153) North of Range Sixty-three (63) West in Ramsey County, North Dakota.

49. These plaintiffs initiated their action on or about May 25, 1999. This court has ruled that an action of this nature against the state or any of its officers or agencies must be commenced within three years of when the action accrued. I find that this plaintiff has commenced this action for inverse condemnation against the state parties within the three year period. The state defendant refers this court to plaintiff's testimony that during the years that the lake receded (in the late 1980's and early 1990's) that the plaintiff moved his boat dock down to the lake's edge. Then, as the lake rose (beginning in 1993) he had to start moving it back up. Although as noted below, there is some inconsistency in the plaintiff's testimony as to the history of flooding and elevations he claims existed on his property's lower levels, this court is not satisfied that the state defendants have met the affirmative burden to prevail on this defense. So, I find this claim was timely commenced.
50. A portion of plaintiff, Lyle G. Dykhoff's property is flooded and/or otherwise damaged by Devils Lake floodwaters. It is a lake lot and has a house on it. The walkout of the basement is at 1449 feet asl. Lyle G. Dykhoff testified his property initially started to flood in May 1998, and flooding increased until 2006. However, in May of 1998 the highest the lake reached was 1444.68. The plaintiff claims that the lower end of his lot was at 1446 feet. He continues to use a portion of the lot. Even though the plaintiff's testimony is inconsistent, in either elevation, the flooding and current condition is attributable to the lake's rise. Additional damages to this property include, but are not limited to, loss of a pole barn, which was removed and a workshop which was burned down.
51. Plaintiff, **Clark A. Steinhaus** reside at 7030 - 50<sup>th</sup> Street NE, Devils Lake, ND 58301.
52. Clark A. Steinhaus owns property near or adjacent to Devils Lake in the County of Ramsey, State of North Dakota with his wife Lois Steinhaus, legally described as:

**Plaintiffs' Exhibit 709**

Commencing at the Northwest corner of Section 26, Township 154 N., Range 66 W., which is the point of beginning, thence due south along section line to meander corner. Thence southeast along meander line to government marker A.P. 3 a distance of 1882.98 feet. Thence south along meander line a distance of 540 feet to a point. Thence due east a distance of 675 feet to a point. Thence north 10° west a distance of 1226 feet to a point. Thence north 60° west a distance of 624 feet to a point which is the southeast corner of tract 1 located in Section 26, Township 154 N., Range 66 W. Thence north 41° - 29' west 428 feet, thence south 88° - 30' east 247 feet, thence north 13° - 17' east

735 feet, thence due west along the section line a distance of 1218 feet to the point of beginning. Approximately 56 acres, more or less.

**Plaintiffs' Exhibit 710**

The Northwest Quarter (NW 1/4) of Section Twenty-six (26), Township One Hundred Fifty-four (154), Range Sixty-six (66), (Lots One (1) and Two (2) and the Northeast Quarter of the Northwest Quarter (NE 1/4 NW 1/4), less parts deeded.

53. Clark A. and Lois Steinhaus' property is completely flooded and/or otherwise damaged by Devils Lake floodwaters. It is property that bordered Mauvais Coulee and near Pelican lake. All of it totals 126 acres. This property initially started to flood in April/May of 1995, when the ice went out, and the flooding gradually increased every year until the entire property was completely flooded in the summer of 2006. This places the property at a low elevation of between about 1432 feet to 1435 feet. Its highest elevation was no more than 1449.2 feet. Additional damages to this property include loss of fences, cross-fences, and a developed water hole.

54. Plaintiff, **Edward Brown** resides at 4251 - 92<sup>nd</sup> Avenue, Devils Lake, ND 58301.

55. Edward and George A. Brown, Jr. claim to own for their farming/ranching operation property near or adjacent to Devils Lake, in Ramsey County, North Dakota, legally described as:

**Plaintiffs' Exhibit 659**

E1/2SW1/4 and the SW1/4SW1/4 of Section 29 in Township 153 North of Range 62 West; and a 5/6ths interest in the NW1/4SW1/4 of Section 29, in Township 153 North of Range 62 West, in Ramsey County, North Dakota.

An undivided 5/6ths interest in and to the E1/2SE1/4, Lots 8 and 9, all in Section 30, Township 153 North of Range 62 West.

An undivided 5/6ths interest in and to Lots 2, 3, 4, 5, 6, 7, 8, 9, and the SE1/4SE1/4 of Section 31, in Township 153 North of Range 62 West, in Ramsey County, North Dakota.

The SE1/4NW1/4 and the NE1/4SW1/4 of Section 1, all in Township 152 North of Range 63 in Ramsey County, North Dakota.

56. The plaintiffs have established no ownership interest in this property by Edward Brown or George A. Brown, Jr. The evidence both from the testimony of Edward Brown and from Plaintiffs' Exhibit 659 is that the property described in Plaintiffs' Exhibit 659 is owned by Verna Brown, the wife of Edward Brown, and Connie Brown, the wife of George A. Brown, Jr. Verna and Connie are not plaintiffs in this action.

Although there was undisputed testimony that Edward and George used this property in their farming/ranching operations, that is insufficient without establishing an ownership interest to prevail on this inverse condemnation claim. At best any lease interest they may

1 have had was at will. Absent evidence of a long term lease interest in this property (and  
2 there was not), a taking by inverse condemnation simply would act to terminate the at will  
3 lease and would not constitute any breach by the lessor of a general covenant to the lessee of  
4 quiet enjoyment. See 26 AmJur 2d §232 at p.623-625 and §94 at p.506-7.

5 Finally, George A. Brown, Jr. gave only limited testimony as to the property set out on  
6 Plaintiffs' Exhibit 659.

7 Based on the above, by not establishing a legal ownership interest in the property discussed  
8 in Plaintiffs' Exhibit 659 including a term lease in it, the inverse condemnation claim as to  
9 these plaintiffs for this property described in Plaintiffs' Exhibit 659 requires dismissal.  
10 However, plaintiffs are not precluded from moving for substitution of parties pursuant to  
11 Rule 17, N.D.R.Civ.P. This was not done at trial nor yet post trial.

12 57. The property set out in Plaintiffs' Exhibit 659 was all flooded and/or otherwise damaged as  
13 described in Plaintiffs' Exhibit 548, and not usable or as usable for farming or ranching.  
14 This property initially started to flood in April 1994, and gradually continued to flood until  
15 2006. So, the low elevation range of the property was 1428 feet to 1429.3 feet. The high  
16 elevation was 1449.2 feet or less.

17 58. Plaintiffs, Edward and George A. Brown, Jr. own property near or adjacent to Devils Lake  
18 in Odessa Township and Stevens Township, Ramsey County, legally described as:

19 **Plaintiffs' Exhibit 660**

20 An undivided 5/6ths interest in and to Lot 10 of Section 31, in Township 153  
21 of Range 62 West, in Ramsey County, North Dakota; together with a 5/6ths  
22 interest in and to the buildings located thereon, except three pole barns, heated  
23 shop, one hopper bin, and ease Circle bin which buildings are already owned  
24 by Buyers.

25 This lot is in Stevens Township

26 Lots 1, 2, and 3, all in Section 1 of Township 152 North of Range 63 West in  
27 Ramsey County, North Dakota.

28 These lots are in Odessa Township.

29 59. These properties are on the northeastern side of Devils Lake. The evidence establishes that  
30 Lots 2 and 3 of Section 1 in Odessa Township have been flooded and/or otherwise damaged  
31 by Devils Lake floodwaters. (See Plaintiffs' Exhibit 598). Lot 1 was not damaged (*Id.*).  
32 (See also Trial Transcript p. 2202). Lot 10 in Section 31 is in Stevens Township. So are  
33 lots 2-9 which were part of Plaintiffs' Exhibit 659. Lots 2-9 were testified about. Lot 10  
34 was not addressed by the plaintiff insofar as damages. Given the context of plaintiff's  
answers to questions relating to his damages being done to lots 2-9 in Section 3 that  
testimony is only in regards to lots 2-9. So, these plaintiff's have failed to establish that Lot

10 in Section 31 of Stevens Township suffered damages or a taking. This part of the claim is dismissed and it will be so ordered.

60. Lots 2 and 3 in Odessa Township initially started to flood in 1997, and the flooding gradually continued to increase until all the property became unusable, with the water continuing to rise to the time of trial. Based on this flooding history the low elevation range of this property was between 1438 feet to 1442.97 feet. The high elevation of flooded land was less than 1449.2 feet.

61. Plaintiff, **George A. Brown, Jr.**, resides at 4297 - 91<sup>st</sup> Avenue NE, Devils Lake, ND 58301.

62. George A. Brown, Jr. claims to own property near or adjacent to Devils Lake in Odessa Township, legally described in part of Plaintiffs' Exhibit 661 as::

**Plaintiffs' Exhibit 661**

South Half of Northeast Quarter (S 1/2 NE 1/4) and North Half of Southeast Quarter (N 1/2 SE 1/4) ((also described as SE1/4 NE1/4, SW1/4 NE1/4, NE 1/4 SE 1/4 and NW 1/4 SE 1/4)) of Section One (1), in Township One Hundred Fifty-two (152) North of Range Sixty-three (63) West in and underlying said premises, together with the right of ingress and egress to explore and extract the same.

63. This property was never identified in the plaintiff pleadings or discovery. Timely objection to Plaintiffs' Exhibit 661 was made as well as consideration of this property as part of George A. Brown's claims. For reasons set forth in the record this court only accepted Plaintiffs' Exhibit 661 as an offer of proof and denied Plaintiff's motion at trial to amend the complaint to include this claim. (See Trial Transcript p.2033-2048). For these reasons this claim is denied and to be dismissed and will be so ordered.

64. Plaintiffs, **Gerald and Linda Schmidt** reside at 312 Sunny Hills Drive, Devils Lake, N.D. 58301.

65. Gerald and Linda Schmidt own property near or adjacent to Devils Lake in Sunny Hills Subdivision, in the County of Ramsey, State of North Dakota, legally described as:

**Plaintiffs' Exhibit 699**

Lot Sixteen (16) of Block One (1), Sunnyhills Subdivision, part of Section Twenty-seven (27), Township One Hundred Fifty-four (154) North of Range Sixty-five (65) West.

66. This property is completely flooded and/or otherwise damaged by Devils Lake floodwaters. This property initially started to flood in the spring of 1994, and the flooding gradually increased until the property was completely flooded in 2002. Therefore, the low elevation range of this property 1428 feet to about 1429.6 feet. Its high elevation was less than

1 1447.43 feet. Additional damages to this property include loss of landscaping, trees, sewer,  
2 cement work, and the basement of their old house.

3 67. Plaintiff, **Donald Mattern** and his wife Carole, reside at 9328 Highway 2, Crary, ND.

4 68. Donald and Carole Mattern own property near or adjacent to Devils Lake, in the County of  
5 Benson, State of North Dakota, legally described as:

6 **Plaintiffs' Exhibit 758**

7 Lots Four (4), Five (5) and Six (6) and the Southeast Quarter of the Southwest  
8 Quarter (SE1/4SW1/4) of Section Twenty-six (26); Lot One (1) of Section  
9 Twenty Seven (27); and the Northeast Quarter of the Northeast Quarter  
10 (NE1/4NE1/4) of Section Thirty-four (34), all in Township One Hundred  
11 Fifty-three (153) North, Range Sixty-four (64) West. The parties of the first  
12 part reserving to themselves, however, fifty percent (50%) of all remaining oil,  
13 gas and other minerals on or under said premises, together with right of  
14 ingress and egress for development thereof.

15 69. Donald and Carole Mattern's property described in Plaintiffs' Exhibit 758 is completely  
16 flooded and/or otherwise damaged by Devils Lake floodwaters. This property initially  
17 started to flood in June of 1994, and became completely flooded in 1997. This places the  
18 property at a low elevation range of 1429.86 feet to 1430.52 feet. The high elevation was  
19 1442.97 feet or less. Additional damages to this property include loss of landscaping,  
20 sewer, and water.

21 70. Donald and Carole Mattern own property near or adjacent to Devils Lake, in the County of  
22 Benson, State of North Dakota, legally described as:

23 **Plaintiffs' Exhibit 759**

24 Northeast Quarter Northeast Quarter (NE1/4NE1/4), Section Thirty-four (34),  
25 Southeast Quarter Southwest Quarter (SE1/4SW1/4), Lots Four (4), Five (5),  
26 Six (6), Section Twenty-six (26), less that part of Lot Six (6), Section Twenty-  
27 six (26), measured from a Survey Pin between Sections 26 and 27, northern  
28 most point, 787.71 feet North-Easterly to the next Survey Pin, thence South to  
29 the Northern edge of Mattern Drive, as shown on the Plat of Mattern's First  
30 Addition, thence Southwesterly to the Section Line between Sections 26 and  
31 27, thence due North to the point of beginning, said parcel containing 7 acres,  
32 more or less, all lying and being in Township One Hundred Fifty-three (153)  
33 North, Range Sixty-four (64) West, Benson County, North Dakota.

34 71. Donald and Carole Mattern's property described in Plaintiffs' Exhibit 759 is completely  
flooded and/or otherwise damaged by Devils Lake floodwaters. This property initially  
started to flood in June of 1994, and became completely flooded in 1997. This places this  
property at a low elevation range of 1429.86 feet to 1430.52 feet. Its high elevation was  
1442.97 feet or less. Additional damages to this property include loss of a pole barn and

costs related to moving a house off of the property, if any.

72. Donald and Carole Mattern started a platted development on and within the property described in Plaintiffs' Exhibits 758 and 759, legally described as:

**Plaintiffs' Exhibit 760**

**DESCRIPTION OF SUBDIVIDED AREA OF MATTERN'S FIRST ADDITION WITHIN BENSON COUNTY, NORTH DAKOTA**

A tract of land located within Government Lots 4, 5 and 6 of Section 26, T153N, R64W of the fifth Principal Meridian, Benson County, North Dakota, being more particularly described as follows:

Commencing at the southwest corner of said Section 26; thence N0°20'53"E along the west line of said Section 26, 508.08 feet to the point of beginning; thence continuing N0°20'55"E along the west line of said Section 26, 63.44 feet; thence N71°24'00"E, 1164.01 feet; thence N29°50'00"W, 514.97 feet to a point 160.00 feet N60°10'00"E from angle point one (1) and on the meander line between Devils Lake and said Section 26; thence N60°10'00"E along the said meander line, 2068.41 feet to a point 349.27 feet S60°10'00"W from angle point two (2) and on the north-south quarter line of said Section 26; thence S0°00'00"W along the said quarter line, 622.03 feet; thence N90°00'00"W, 160.00 feet; thence N0°00'00"E, 230.55 feet; thence S60°10'00"W, 1674.87 feet; thence S29°50'00"E, 328.06 feet; thence S71°24'00"W, 1257.70 feet to a point on the west line of said Section 26 and to the point of beginning.

Said tract contains 14.99 acres more or less.

Bearings for the plat and description were deflected from a bearing of N60°10'00"E along the meander line between angles points 1 and 2 of Section 26 as established by the Bureau of Land Management during the "1967" dependent resurvey.

The tract of land is particularly described and set forth on the plat with the names, widths, courses, boundaries and extent thereof. The figures representing the distances, length and breadth denote feet and decimals thereof. All designated road right-of-way within the boundary of said Mattern's First Addition as shown on said plat hereon are dedicated for the public use forever and the easements as shown on said plat hereon are as Indicated.

**PLAT DESCRIPTION**

Block 1, Lots 1 through 18 and Block 2, Lot 1 of Mattern's First Addition within Government Lots 4, 5, and 6 of Section 26, T153N, R64W, Benson County, North Dakota.

73. Prior to the property flooding, Donald and Carole Mattern conveyed the following lots from the subdivided area described in Plaintiffs' Exhibit 760, while retaining the remainder: These lots described below are not a part of their claim.

**Plaintiffs' Exhibit 761**

Lot 1 MATTERN'S FIRST ADDITION, Government Lots 4, 5, and 6  
Section 26, Township 153 N, Range 64 West.

**Plaintiffs' Exhibit 762**

Lot 2 MATTERN'S FIRST ADDITION, Government Lots 4, 5, and 6  
Section 26, Township 153 N, Range 64 West.

**Plaintiffs' Exhibit 763**

Lot 3 MATTERN'S FIRST ADDITION, Government Lots 4, 5, and 6  
Section 26, Township 153 N, Range 64 West.

**Plaintiffs' Exhibit 764**

Lot 4 MATTERN'S FIRST ADDITION, Government Lots 4, 5, and 6  
Section 26, Township 153 N, Range 64 West.

**Plaintiffs' Exhibit 765**

Lots 5&6 MATTERN'S FIRST ADDITION, Government Lots 4, 5, and 6  
Section 26, Township 153 N, Range 64 West.

**Plaintiffs' Exhibit 766**

Lot 17 MATTERN'S FIRST ADDITION, Government Lots 4, 5, and 6  
Section 26, Township 153 N, Range 64 West.

74. Plaintiffs, **Douglas Ketterling and Mary Nicholson**, a married couple, reside at 7519  
Highway 19, Devils Lake, ND 58301.
75. Douglas Ketterling and Mary Nicholson own property near or adjacent to Devils Lake,  
legally described as:

**Plaintiffs' Exhibit 727**

One tract of land lying in Lots One (1) and Two (2) of Section Thirty-four  
(34), Township One Hundred Fifty-four (154) North, Range Sixty-five (65)  
West of the Fifth Principal Meridian, Ramsey County, North Dakota; more  
particularly described as follows:

Beginning at the North quarter (1/4) corner of said Section 34; thence South  
01°07'00" East along the North-South quarter (1/4) line a distance of 2646.35  
feet; thence North 89°57'00" West along the East-West quarter (1/4) line a  
distance of 1516.90 feet to a point on the northerly right of way of North  
Dakota State Highway 19; thence North 28°16'00" West along said right of  
way a distance of 681.80 feet to a point on the meander line of Devils Lake;  
thence North 42°32'00" East along said meander line a distance of 451.12 feet  
to angle point no. 2; thence North 32°26'00" East continuing along said  
meander line a distance of 2028.89 feet to the North meander corner of said  
Section 34; thence South 89°54'28" East along the north line of Section 34 a  
distance of 394.65 feet to the point of beginning, in accordance with the  
attached plat, containing 73.42 acres more or less.

- 1 76. Douglas Ketterling and Mary Nicholson's property totals 73.42 acres. Of that, 20 acres  
2 were flooded. Twenty-three acres of the property had been developed as a subdivision and  
3 was platted. Because of its present configuration the remaining property according to the  
4 plaintiff has less value than prior to the time it began to flood. This is not contradicted. So,  
5 it is found that this non-flooded property also had some amount of damage due to the  
6 adjacent flooding. This property initially started to flood in the spring of 1996, and  
7 progressively flooded to the time of trial. This placed the property at a low elevation range  
8 of between 1435.2 feet and 1437 feet and a high elevation of less than 1449.2 feet for the  
9 flooded portion of the land. Additional damages include loss of roads, and other  
10 improvements made to a subdivision constructed on the property.
- 11 77. Plaintiff, **Marjorie Wood**, is subject to a conservatorship and/or a guardianship. Marjorie  
12 Wood resides at 1731 Prairie Lane, Fargo, ND 58301. Her co-conservator is Pam Wood  
13 Solway, her daughter. Pam Wood Solway testified and established personal knowledge of  
14 the property during the subject period described below and its history.
- 15 78. Marjorie Wood owns property near or adjacent to Devils Lake in Roberts Subdivision,  
16 Ramsey County, North Dakota, legally described as:

17 **Plaintiffs' Exhibit 886**

18 Lots Ten (10) and Eleven (11) of Roberts' Subdivision, a part of the North  
19 Half (N 1/2) of Lot Four (4), in Section Sixteen (16), Township One Hundred  
20 fifty-three (153) North, Range Sixty-four (64) West, in Ramsey County, North  
21 Dakota.

22 **Plaintiffs' Exhibit 887**

23 A tract of land commencing at the northwest corner of Lot Twelve (12), of  
24 Roberts Subdivision of the North Half (N1/2) of Lot Four (4), in Section  
25 Sixteen (16), in Township One Hundred Fifty-three (153) North of Range  
26 Sixty-four (64) West, thence west thirty (30) feet, thence south one hundred  
27 thirty (130) feet, thence east thirty (30) feet to the west line of said Lot Twelve  
28 (12), thence north one hundred thirty (130) feet to the point of beginning.

29 **Plaintiffs' Exhibit 888**

30 Lot Twelve (12) of Robert's Subdivision of the North-Half (N1/2) of Lot Four  
31 (4) of Section Sixteen (16) in Township One Hundred Fifty-three (153) North  
32 of Range Sixty-four West in Ramsey County, North Dakota.

- 33 79. These three lots and an adjacent 30 foot strip to Lot 12 total approximately three acres. The  
34 property is completely flooded and/or otherwise damaged by Devils Lake floodwaters. This  
property initially started to be impacted by flooding in 1994. This places its low elevation  
range at between 1420 feet to 1430.89 feet. The property became three quarters flooded in  
1998. In 1999 two and one-half of the three lots were under water. The ground level of

1 their house was surveyed at 1446.5 feet asl. The remaining property not flooded is damaged  
2 and is not usable. Additional damages to this property include loss of landscaping, rural  
3 water and sewer and the loss of a house which had to be burned down.

4 80. Plaintiff, **Mary Dion** resides at 908 8th Street, Devils Lake, N.D. Thomas Dion is her son.  
5 His testimony established his personal knowledge of her property and affairs. Thomas Dion  
6 resides at 207 - 10<sup>th</sup> Street NW, Devils Lake, ND 58301.

7 81. Mary E. Dion owns property near or adjacent to Devils Lake, in Grand Harbor Township,  
8 Township 154 North, Range 65 West, legally described as:

9 **Plaintiffs' Exhibit 724**

10 All that part of the South Half of the Southeast Quarter (S1/2SE1/4) of Section  
11 Fourteen (14) except Thirty-One (31) acres which has been deeded to Tri-  
12 State Land Company. The land herein described is that part of the South Half  
13 of the Southeast Quarter (S1/2SE1/4) of Section Fourteen (14) that lies south  
14 of the Soo Line right of way, which land is in Township One Hundred Fifty-  
15 Four (154) North, Range Sixty-Five (65) West of the Fifth Principal Meridian;  
16 and The Southwest Quarter of the Northwest Quarter (SW1/4NW1/4), the  
17 Northeast Quarter of the Northwest Quarter (NE1/4NW1/4), and Lots One (1),  
18 Two (2), Six (6) and Seven (7), all in Section Twenty-two (22), Township One  
19 Hundred Fifty-Four (154) North, Range Sixty-Five (65) West of the Fifth  
20 Principal Meridian; and the North Half of the Northeast Quarter (N1/2NE1/4)  
21 the Northeast Quarter of the Northwest Quarter (NE1/4NW1/4) and Lots One  
22 (1), Two (2), and Three (3), and the Southeast Quarter of the Northwest  
23 Quarter (SE1/4NW1/4) and the Northeast Quarter of the Southwest Quarter  
24 (NE1/4SW1/4), all in Section Twenty-Three (23), Township One Hundred  
25 Fifty-Four (154) North, Range Sixty-Five (65) West of the Fifth Principal  
26 Meridian, all in the County of Ramsey, State of North Dakota.

27 82. Plaintiff, Mary E. Dion's property as to that portion identified at and limited to paragraph 52  
28 of the Amended Complaint is flooded and/or otherwise damaged by the flooding from  
29 Devils Lake. Of the total 700 to 800 acres of property, 300 to 400 have been flooded,  
30 cutting the property in two pieces, devaluing the entire property in that it is saturated and  
31 unstable, and more difficult to access. This property initially started to flood in May or June  
32 of 1994 and has gradually continued to flood to the present condition of the property at trial.  
33 Based on this, the low elevation range of the property was between 1429.28 feet to 1430.52  
34 feet. The high elevation of the land flooded is less than 1449.2 feet. Additional damages to  
this property include loss of buildings, fences, a pole barn, two or three wooden granaries,  
six steel bins, a machine shed, and a house.

83. Plaintiff, **Jean K. Davis** resides at 702 Highway 2 West, Devils Lake, N.D. 58301.

84. Jean K. Davis owns property near or adjacent to Devils Lake in Ramsey County, legally

described as:

**Plaintiffs' Exhibit 694**

Lot One (1) and the North Half of Lot Two (2), Woodland Place Subdivision, located in Sections Twelve (12) and Thirteen (13), Township One Hundred Fifty-three (153), Range Sixty-five (65), Ramsey County, North Dakota.

85. Jean K. Davis' property is completely flooded and/or otherwise damaged by the flooding from Devils Lake. Plaintiff, Jean K. Davis' property initially started to flood in May of 1995. This placed its low elevation range at between 1433.83 feet and 1435.26 feet. The flooding continued until the property was no longer accessible in the first week of May, 1997. So, its high elevation was not greater than 1442.03 feet.
86. Plaintiff, **Gordon Shafer** and his wife Lillian reside at 21422 County Highway 25, Detroit Lakes, MN.
87. Gordon and Lillian Shafer own property near or adjacent to Devils Lake, in Ramsey County, State of North Dakota, legally described as:

**Plaintiffs' Exhibit 773**

An undivided one-third (1/3) interest in and to the following described property: The Northeast Quarter (NE1/4) less parts deeded; the North Half of the Southeast Quarter (N1/2SE1/4); the Southwest Quarter Southeast Quarter (SW1/4SE1/4) and Lot One (1); all in Section Eleven (11), Township One Hundred Fifty-three (153) North, Range Sixty-four (64) West and Lot One (1), Section Fourteen (14), Township One Hundred Fifty-three (153) North, Range Sixty-four (64) West in Ramsey County, North Dakota, containing 348 acres, more or less. (Excluding that part of Lot One (1), Section Fourteen (14) west of the quarter line.)

88. Gordon and Lillian Shafer's property is flooded and/or otherwise damaged by Devils Lake floodwaters. Although the total acreage is 348 acres, only 170 acres is the subject of this suit. That total acreage (348 acres) is divided by a dike. The land on the "dry" side of the dike is the subject of an eminent domain proceeding separate from this action. The land on the "wet" side of the dike totals 170 acres. At the time of trial 25 acres was still dry, but the remaining acreage had been flooded by Devils Lake. The land not flooded cannot be accessed because of the government dike. This property initially started to flood in the spring of 1994. This placed its low elevation range between 1428 feet to about 1430 feet. Its high elevation of flooded land is less than 1449.2 feet.. Additional damages to the property include loss of buildings, trees, fences, and cattle watering ponds.
89. Gordon Shafer by his testimony established personal knowledge of the property in Plaintiffs' Exhibit 772 of **Plaintiffs Carol and Arthur Rohr** who reside at 4919 93rd Avenue NE, Crary, N.D. 58327.

- 1 90. Carol and Arthur Rohr own property near or adjacent to Devils Lake in Ramsey county,  
2 State of North Dakota, legally described as:

3 **Plaintiffs' Exhibit 772**

4 An undivided one-third (1/3) interest in and to the following described  
5 property:

6 The Northeast Quarter (NE1/4) less parts deeded; the North Half of the  
7 Southeast Quarter (N1/2SE1/4); Southwest Quarter Southeast Quarter  
8 (SW1/4SE1/4) and Lot One (1); all in Section Eleven (11), Township One  
9 Hundred Fifty-three (153) North, Range Sixty-four (64) West and Lot One (1),  
10 Section Fourteen (14), Township One Hundred Fifty-three (153) North, Range  
11 Sixty-four (64) West in Ramsey County, North Dakota, containing 348 acres,  
more or less. (Excluding that part of Lot One (1), Section Fourteen (14) west  
of the quarter line.)

- 12 91. Carol and Arthur Rohr's property is flooded and/or otherwise damaged by Devils Lake  
13 floodwaters. This is the same property described in Plaintiffs' Exhibit 773 owned by  
14 Gordon and Lillian Shafer. This property initially started to flood in the Spring of 1994 that  
15 continued to gradually flood with the increased lake levels of Devils Lake. Additional  
16 damages to this property include loss of buildings, trees, fences, and cattle watering ponds.  
17 92. Plaintiff **Richard Shafer** and his wife, Helen, reside at 2538 Howard Avenue, Billings, MT  
18 59102. Gordon Shafer established that he had personal knowledge of the property of  
19 Richard and Helen Shafer described in Plaintiffs' Exhibit 771.  
20 93. Richard and Helen Shafer own property near or adjacent to Devils Lake, legally described  
21 as:

22 **Plaintiffs' Exhibit 771**

23 An undivided one-third (1/3) interest in and to the following described  
24 property:

25 The Northeast Quarter (NE1/4) less parts deeded; the North Half of the  
26 Southeast Quarter (N1/2SE1/4); the Southwest Quarter Southeast Quarter  
27 (SW1/4SE1/4) and Lot One (1); all in Section Eleven (11), Township One  
28 Hundred Fifty-three (153) North, Range Sixty-four (64) West and Lot One (1),  
29 Section Fourteen (14), Township One Hundred Fifty-three (153) North, Range  
30 Sixty-four (64) West in Ramsey County, North Dakota, containing 348 acres,  
more or less. (Excluding that part of Lot One (1), Section Fourteen (14) west  
of the quarter line.)

- 31 94. Richard and Helen Shafer's property is flooded and/or otherwise damaged by Devils Lake  
32 floodwaters. This is the same property owned by Gordon and Lillian Shafer described in  
33 Plaintiffs' Exhibit 773. This property initially started to flood in the Spring of 1994 that  
34 continued to gradually flood with the increased lake levels of Devils Lake. Additional  
damages to this property include loss of buildings, trees, fences, and cattle watering ponds.

1 95. Plaintiffs, Myron and Darlene Wold reside at 4221 115<sup>th</sup> Avenue NW, Watford City, ND.  
2 Myron Wold testified as to the condition of the property owned by Darlene Wold and  
3 established his personal knowledge of the property.

4 96. Darlene Wold at one time owned property near or adjacent to Devils Lake, in Odessa  
5 Township, Township 151 and 152 North, Range 62 West, legally described as:

6 **Plaintiffs' Exhibit 777**

7 A one-half undivided interest in and to the following described real estate:  
8 Lots 2, 3 and 4 and all of that part of the Southwest Quarter of the Northeast  
9 Quarter (SW1/4NE1/4) and the Northwest Quarter of the Southeast Quarter  
10 (NW1/4SE1/4) and Lot Five (5) lying West of the County Road running in a  
11 North and South direction through said property, all in Section 28, Township  
12 152, Range 62 West of the Fifth Principal Meridian, Ramsey County, North  
13 Dakota.

14 97. Darlene Wold's property is flooded and/or otherwise damaged and is now inaccessible by  
15 Devils Lake floodwaters. At the time the flooding initially occurred in 1994, Darlene Wold  
16 owned the property. In 2002 it was sold to Barry Cox. This property in Plaintiffs' Exhibit  
17 777 initially started to flood in 1994, with gradually increasing flooding. This means this  
18 property had a low elevation range of between 1427.81 feet and 1430.89 feet. Additional  
19 damages to this property include loss of fences and buildings. Any award must be set off  
20 against what was paid to the plaintiff by Barney Cox.

21 98. Darlene Wold owns property near or adjacent to Devils Lake in Odessa Township,  
22 Township 151 and 152 North, Range 62 West, Ramsey County, State of North Dakota,  
23 legally described as:

24 **Plaintiffs' Exhibit 778**

25 A one-third undivided interest in and to the following described real estate:  
26 Township One Hundred Fifty-two (152) North, Range Sixty-two (62) West,  
27 Fifth Principal Meridian: In section Thirty-three (33), that part of lot three (3)  
28 lying westerly and northerly of the lines described as follows: Beginning at a  
29 point on the north line of said lot three (3) S. 89°55'20" W., 3.000 chains from  
30 the northeast corner thereof; thence S. 0°06'15" E., 2.900 chains; thence S.  
31 45°00'00" W, 4.000 chains; thence S. 89°55'20" W., 15.292 chains to a point on  
32 the west line of said lot three (3) S. 20°29'22" E., 6.108 chains from the  
33 northwest corner thereof and there terminating; together with the Southeast  
34 Quarter Northeast Quarter (SE 1/4 NE 1/4) except the east 3.000 chains  
thereof; and in section Thirty-four (34), the North 1.850 chains of the west  
36.860 chains lying easterly of the west 8.000 chains of the South Half  
Northwest Quarter (S 1/2 NW 1/4). The above described tracts contain, in the  
aggregate, 50.00 acres, more or less.

99. Darlene Wold's property described above is flooded and/or otherwise damaged, and is

1 inaccessible because of Devils Lake floodwaters. The upper side is not flooded but it is not  
2 accessible. So, the whole property is flooded or damaged.\* This property in Plaintiffs'  
3 Exhibit 778 initially started to flood in 1994, with gradually increasing flooding. This  
4 means this property had a low elevation range of between 1427.81 feet and 1430.89 feet.  
5 Additional damages include loss of fences.

- 6 100. Darlene Wold owns property near or adjacent to Devils Lake in Odessa Township,  
7 Township 151 and 152 North, Range 62 West, Ramsey County, North Dakota, legally  
8 described as:

9 **Plaintiffs' Exhibit 779**

10 The North Half of the Southwest Quarter (N1/2SW1/4) of Section Twenty-  
11 seven (27), Township One Hundred Fifty-two (152) North of Range Sixty-two  
12 (62) West of the Fifth Principal Meridian.

13 **Plaintiffs' Exhibit 780**

14 The Northeast Quarter of the Southeast Quarter (NE1/4SE1/4) of Section  
15 Twenty-seven (27), Township One Hundred Fifty-two (152) North of Range  
16 Sixty-two (62), Ramsey County, North Dakota.

17 **Plaintiffs' Exhibit 781**

18 Northwest Quarter of the Southeast Quarter (NW1/4SE1/4) of Section Twenty-  
19 seven (27), Township One Hundred Fifty-two (152) North of Range Sixty-two  
20 (62) West of the Fifth Principal Meridian, Ramsey County, North Dakota.

- 21 101. Except as otherwise held, Plaintiff, Darlene Wold's property described in Plaintiffs'  
22 Exhibits 779, 780, and 781 is flooded and/or otherwise damaged and is inaccessible due to  
23 the flooding from Devils Lake. All of this property is 240 acres in size. 20-25 acres are not  
24 flooded but are not accessible. 80 acres were sold as a flood easement. Based on that, this  
25 80 acres for any damages should be set off against any monies received for its sale. This  
26 property initially started to flood in 1997 or 1998, with gradually increasing flooding. This  
27 means the property described above had a low elevation range of 1437.8 feet to 1444.7 feet.

- 28 102. Plaintiff, Darlene Wold at one time owned property near or adjacent to Devils Lake in  
29 Odessa Township, Township 151 and 152 North, Range 62 West, legally described as:

30 **Plaintiffs' Exhibit 782**

31 Lot Five (5) of Section Five (5), Township One Hundred Fifty-one (151)  
32 North, Range Sixty-two (62) West of the Fifth Principal Meridian, in Ramsey  
33 County, North Dakota.

- 34 103. This property in Plaintiffs' Exhibit 782 is partially flooded and/or otherwise partially  
damaged by Devils Lake floodwaters. It is a 40 acre parcel and 10 acres are flooded. In  
2002 or 2003 Darlene Wold sold all this property to Fred Strunk. This property in  
Plaintiffs' Exhibit 782 initially started to flood in 1994, with gradually increasing flooding.

1 This means it had a low elevation range between 1427.81 feet and 1430.89 feet. The  
2 acreage that is flooded is below 1449.2 feet. Additional damages to this property include  
3 loss of fences.

- 4 104. Darlene Wold owns property near or adjacent to Devils Lake, in Odessa Township,  
5 Township 151 and 152 North, Range 62 West, legally described as:

6 **Plaintiffs' Exhibit 783**

7 Northeast Quarter of the Southeast Quarter (NE1/4SE1/4) of Section Twenty-  
8 one (21), Township One Hundred Fifty-two (152) North, Range Sixty-two (62)  
9 West of the Fifth Principal Meridian, Ramsey County, North Dakota.

- 10 105. Darlene Wold's property in Plaintiffs' Exhibit 783 is partially flooded and/or otherwise  
11 partially damaged by the Devils Lake floodwaters. It is an 80 acre parcel and 10 acres are  
12 flooded. This property set out in Plaintiffs' Exhibit 783 initially started to flood in 1994,  
13 with gradually increasing flooding. That means it has a low elevation range of 1427.81 feet  
14 to 1430.89 feet. The land actually flooded is below 1449.2 feet. Additional damages to this  
15 property include loss of fences.

- 16 106. Darlene Wold at one time owned property near or adjacent to Devils Lake, in Odessa  
17 Township, Township 151 and 152 North, Range 62 West, legally described as:

18 **Plaintiffs' Exhibit 784**

19 Government Lots One (1), Two (2) and Three (3) of Section Twenty-one (21),  
20 Township One Hundred Fifty-two (152) North of Range Sixty-two (62) West in  
21 Ramsey County, North Dakota.

- 22 107. This property in Plaintiffs' Exhibit 784 is partially flooded and/or otherwise partially  
23 damaged by Devils Lake floodwaters. It is an 80 acre parcel and 5 acres are flooded. It was  
24 sold in ten separate transactions beginning in 2001 or 2002. This property in Plaintiffs'  
25 Exhibit 784 initially started to flood in 1994, with gradually increasing flooding. This  
26 means, it had a low elevation range of 1429.81 feet to 1430.89 feet. The land actually  
27 flooded is below 1449.2 feet. Any damages for property sold must be set off against any  
28 sale price.

- 29 108. Darlene Wold owns property near or adjacent to Devils Lake, in Odessa Township,  
30 Township 151 and 152 North, Range 62 West, Ramsey County, North Dakota, legally  
31 described as:

32 **Plaintiffs' Exhibit 785**

33 A one-third undivided interest in and to the following described real estate:  
34 Township One Hundred Fifty-two (152) North, Range Sixty-two (62) West, of  
the Fifth Principal Meridian: In Section Thirty-three (33), that part of Lot Three  
(3) lying westerly and northerly of the lines described as follows: Beginning at  
a point on the north line of said Lot Three (3) S. 89°55'20" W., 3.000 chains

1 from the northeast corner thereof; thence S. 0°06'15" E., 2.900 chains; thence  
2 S. 45°00'00" W., 4.000 chains; thence S. 89°55'20" W., 15.292 chains to a point  
3 on the west line of said Lot Three (3) S. 20°29'22" E., 6.108 chains from the  
4 northwest corner thereof and there terminating; together with the Southeast  
5 Quarter of the Northeast Quarter (SE1/4NE1/4) except the east 3.000 chains  
6 thereof; and in Section Thirty-four (34), the North 1.850 chains of the west  
7 36.860 chains lying easterly of the west 8.000 chains of the South Half of the  
8 Northwest Quarter (S1/2NW1/4). The above described tracts contain, in the  
9 aggregate, 50.00 acres, more or less.

10 109. Darlene Wold's property in Plaintiffs' Exhibit 785, totaling 50 acres is partially flooded  
11 and/or otherwise partially damaged by the flooding from Devils Lake. This property  
12 initially started to flood in 1994, with gradually increasing flooding. That means it had a  
13 low elevation range of 1427.81 feet to 1430.89 feet. The land actually flooded has an  
14 elevation of less than 1449.2 feet. Additional damages to this property include loss of  
15 fences.

16 110. Darlene Wold owns some but not all of the property near or adjacent to Devils Lake, in  
17 Ramsey County, North Dakota, legally described as:

18 **Plaintiffs' Exhibit 786**

19 In Section Thirty-three (33), that part of Lot Three (3) lying westerly and northerly of  
20 the lines described as follows: Beginning at a point on the north line of said Lot Three  
21 (3) S. 89°55'20" W., 3.000 chains from the northeast corner thereof; thence S. 0°06'15"  
22 E., 2.900 chains; thence S. 45°00'00" W., 4.000 chains; thence S. 89°55'20" W., 15.292  
23 chains to a point on the west line of said Lot Three (3) S. 20°29'22" E., 6.108 chains  
24 from the northwest corner thereof and there terminating; together with the Southeast  
25 Quarter of the Northeast Quarter (SE1/4NE1/4) except the east 3.000 chains thereof;  
26 and in Section Thirty-four (34), the North 1.850 chains of the west 36.860 chains lying  
27 easterly of the west 8.000 chains of the South Half of the Northwest Quarter  
28 (S1/2NW1/4);

29 Lots Two (2) and Eleven (11) of Section Thirty-three (33); and

30 Lot Two (2) of Section Thirty-two (32), all in Township One Hundred Fifty-two  
31 (152) North, Range Sixty-two (62) West of the Fifth Principal Meridian.

32 111. In 2003 Lot 2 and 11 were sold to Fred Strunk as was Lot 2 in Section 32. All of the  
33 property in Plaintiffs' Exhibit 786 was completely flooded and/or otherwise damaged by  
34 Devils Lake floodwaters at the time it was sold. This property initially started to flood in  
1994, with gradually increasing flooding. That means it had a low elevation range of  
1429.81 feet to 1430.89 feet. Its high elevation was below 1449.2 feet and likely closer to  
1447.52 feet. Additional damages for this property include loss of fences. Any damages  
claimed for property sold must be set off against any sale price.

112. Plaintiff, Dennis J. Mertens of **Mertens Farm Partnership** (Robert Mertens, Dennis

Mertens, Henry Mertens, Jr., Thomas Mertens, Timothy Mertens) resides at 8378 Highway 2, Devils Lake, ND 58301.

113. Plaintiff, Mertens Farm Partnership (Robert Mertens, Dennis Mertens, Henry Mertens, Jr., Thomas Mertens, Timothy Mertens) owns property near or adjacent to Devils Lake, legally described as:

**Plaintiffs' Exhibit 767**

Lots 2, 3, and 4; S 1/2 NE1/4; N1/2 SE 1/4; and the N 1/2 SW 1/4, Section 12, Township 153 North, Range 64 West, Ramsey County, North Dakota, less parcels previously deeded.

114. Merten Farm Partnership's (Robert Mertens, Dennis Mertens, Henry Mertens, Jr., Thomas Mertens, Timothy Mertens) property is, as to Lots 2, 3, and 4 all flooded and/or otherwise damaged and as to the Southwest Quarter of the Southeast Quarter. 140 acres is flooded and/or otherwise damaged by the Devils Lake floodwaters, as shown in Plaintiffs' Exhibit 551, a map of Creel Township. This property initially started to flood in May of 1997, and become completely flooded in 1997. This means the property's low elevation range was 1439.7 feet to 1442 feet. Its high elevation was not more than 1442.97 feet. Additional damages to this property include loss of fences.

115. Plaintiff, **R.A. Charlton** is the President of plaintiff **Northshore, Inc.**, and resides at 339 Northstar Drive, Grafton, ND 58237. R.A. Charlton testified on behalf of Northshore, Inc.

116. Northshore, Inc. owns or owned property near or adjacent to Devils Lake in the Northshore Subdivision, legally described as:

**Plaintiffs' Exhibit 670**

Protective Covenant Declaration (Northshore, Inc.)

**Plaintiffs' Exhibit 552**

Plat Map of Northshore Subdivision

117. Northshore, Inc.'s property is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood into the marina in late 1994 or early 1995 and into the subdivided properties in May of 1997. This means the property had a low elevation of not less than 1430.5 feet approximately. Plaintiff, Ronald J. Capp is the Secretary Treasurer of Plaintiff Northshore, Inc., and described the dates of flooding as depicted in Plaintiffs' Exhibit 553. Additional damages to this property include lost components of sewer, the road constructed for Charlton Avenue, First Street, Capp Drive, a marina with docks for 72 boats, ramps going down to each dock, and a gate, the gravel in the parking area, fencing, a concrete ramp, excavating, riprap, a lantern on the inside of the marina, and the boat landing.

1 118. Plaintiff, **R.A. Charlton** resides at 339 Northstar Drive, Grafton, ND 58237.

2 119. R.A. Charlton owns property near or adjacent to Devils Lake in Ramsey County, North  
3 Dakota, in the Northshore Subdivision, legally described as:

4 **Plaintiffs' Exhibit 668**

5 Lot One (1), Block One (1), North Shore Subdivision, according to the certified  
6 plat of record in the office of the Register of Deeds. Together with all apparent  
7 riparian lands with property lines through riparian land as designated by  
8 Northshore Inc.

9 **Plaintiffs' Exhibit 669**

10 Lots 10 & 11, Block 2, North Shore Subdivision, according to the certified plat  
11 of record in the office of the Register of Deeds.

12 120. R.A. Charlton's property, namely Lot 1 of Block 1, is completely flooded and/or otherwise  
13 damaged and Lots 10 and 11 in Block 2 are flooded and/or otherwise completely damaged  
14 by Devils Lake floodwaters. Lot one is completely flooded. Lot 10 and 11 are partially  
15 flooded. This property initially started to flood sometime after November of 1994 with  
16 gradual ongoing flooding with the increased lake levels of Devils Lake. This means the low  
17 elevation of the lots was about 1430.8 feet msl. The property actually flooded had an  
18 elevation below 1449.2 feet. Additional damages to this property include for Lots 10 and  
19 11, Block 2, loss of sewer improvements, water lines that were run into the lots, cleanup,  
20 rock picking and landscaping; damages to Lot 1, Block 1 include loss of a septic tank,  
21 public sewer, landscaping, and the house moved in 1997.

22 121. Plaintiff, **Ronald J. Capp** resides at 15508 County Road 11, Grafton, ND 58237.

23 122. Ronald J. Capp owns property near or adjacent to Devils Lake in Ramsey County, North  
24 Dakota, in the Northshore Subdivision, legally described as:

25 **Plaintiffs' Exhibit 673**

26 Lot Two (2), Block One (1), North Shore Subdivision, according to the  
27 certified plat of record in the office of the Register of Deeds. Together with  
28 all apparent riparian lands with property lines through riparian land as  
29 designated by Northshore Inc.

30 **Plaintiffs' Exhibit 667**

31 Lot 8 & 9, Block 2, North Shore Subdivision, according to the certified plat  
32 of record in the office of the Register of Deeds.

33 123. Ronald J. Capp's property at Lot 2 of Block 1 is completely flooded and/or otherwise  
34 damaged. Lots 8 and 9 of Block 2 are between fifty and seventy-five percent flooded and/or  
otherwise completely damaged by the Devils Lake floodwaters. This property initially  
started to flood on Lot 2 of Block 1 in May of 1997 and Lots 8 and 9 of Block 2 in the fall  
of 1997, with the flooding gradually increasing. So, Lots 2 of Block 1 had a low elevation

1 range of 1439.7 feet to 1442 feet. Lots 8 and 9 had a low elevation of about 1442.8 feet.  
2 Additional damages to this property include loss of improvements for sewer, water lines, on  
3 the properties and improvements to the properties of landscaping, rock picking, and trees,  
4 and branches that were collected.

5 124. Plaintiffs, **Dennis L. Melland** and his wife, Jacqueline, reside at 611 North Madison,  
6 Edmore, ND 58330.

7 125. Dennis L. and Jacqueline Melland own property near or adjacent to Devils Lake, in Ramsey  
8 County, North Dakota, legally described as:

9 **Plaintiffs' Exhibit 799**

10 Lot Seven (7), Block One (1), North Shore Subdivision, according to the  
11 certified plat of record in the office of the Register of Deeds. No riparian lands  
are included in this transfer.

12 126. Dennis L. and Jacqueline Melland's property is flooded and/or otherwise damaged by Devils  
13 Lake floodwaters. The lot is currently completely under water. This property initially  
14 started to flood in the fall of 1994, and continued to flood until it was completely flooded in  
15 1997. This means it had a low elevation range on the lot of about 1430.4 feet to 1430.17  
16 feet. The high elevation of the property was not greater than 1442.97 feet incl. Additional  
17 damages to this property include loss of water line, sewer line, grass seeding, and  
18 landscaping.

19 127. **Dennis and Rodney Melland** own property near or adjacent to Devils Lake in Ramsey  
20 County, North Dakota, in the Northshore Subdivision legally described as:

21 **Plaintiffs' Exhibit 881**

22 Lot 9 (Nine), Block 6 (Six), North Shore subdivision, according to the certified  
23 plat of record in the office of the Register of Deeds.

24 **Plaintiffs' Exhibit 882**

25 Lot 8 (Eight), Block 6 (Six), North Shore Subdivision, according to the  
certified plat of record in the office of the Register of Deeds.

26 128. Dennis and Rodney Melland's property is three quarters under water by flooding and has  
27 been completely damaged by floodwaters from Devils Lake. There is not sufficient dry land  
28 left on these lots to use them as such. This property initially started to flood Lot 9 of Block  
29 6 in the fall of 1994 and Lot 8 of Block 6 in 1997 or 1998, with gradual increasing flooding.  
30 So, Lot 9 had a low elevation of about 1430.4 feet and Lot 8 had a low elevation of about  
31 1443 to 1444.7 feet. Additional damages include loss of water and sewer lines, grass  
32 seeding, and landscaping.  
33  
34

1 129. **Dennis Melland** by his testimony established personal knowledge of the property owned by  
2 Robert and Gail Melland. The plaintiff Rodney Melland and his wife Gail reside at 611  
3 North Madison, Edmore, ND 58330.

4 130. Rodney and Gail Melland own property near or adjacent to Devils Lake, in Ramsey County,  
5 North Dakota, in the Northshore Subdivision, legally described as:

6 **Plaintiffs' Exhibit 800**

7 Lot 6 (Six), Block 1 (One), North Shore Subdivision, according to the certified  
8 plat of record in the office of the Register of Deeds. No riparian lands are  
included in this transfer.

9 131. Rodney and Gail Melland's property is completely flooded and/or damaged by the flooding  
10 from Devils Lake. This property initially started to flood in the fall of 1994 and became  
11 totally flooded in July, 1997. This means the property had a low elevation range of about  
12 1430.4 feet to 1430.7 feet. Its high elevation was not greater than 1442.97 feet. Additional  
13 damages to this property include loss of water and sewer lines, grass seeding, and  
14 landscaping.

15 132. Plaintiff, **Edval Helle, Jr.** resides at 711 Grant, Edmore, ND 58330.

16 133. Edval Helle, Jr. owns property near or adjacent to Devils Lake in Ramsey County, North  
17 Dakota, in the Northshore Subdivision, legally described as:

18 **Plaintiffs' Exhibit 729**

19 Lot 4 (Four), Block 1 (one), North Shore Subdivision, according to the  
20 certified plat of record in the office of the Register of Deeds.  
No riparian Lands are included in this transfer.

21 **Plaintiffs' Exhibit 730**

22 Lot 7 (Seven), Block 6 (Six), North Shore Subdivision, according to the  
23 certified plat of record in the office of the Register of Deeds.

24 134. Edval Helle, Jr.'s property Lot 4 of Block 1 is completely flooded and Lot 7 of Block 6 is  
25 three quarters flooded and completely damaged by the flooding from Devils Lake. This  
26 property described in Plaintiffs' Exhibit 729 initially started to flood in the fall of 1994. So  
27 it had a low elevation range of about 1430.4 feet to 1430.7 feet. It was completely flooded  
28 in 1995 or 1996. This means it had a high elevation of between 1435 feet and 1437.8 feet.  
29 The property described in Plaintiffs' Exhibit 730 initially started to flood in 1997. So, it has  
30 a low elevation range of 1436.9 feet to 1442.97 feet. It has continued to flood up to the time  
31 of trial. Additional damages to this property include for the property described in Plaintiffs'  
32 Exhibit 729, loss of sewer and water lines. Damages to the property described in Plaintiffs'  
33 Exhibit 730 include clean up costs, landscaping and loss of electric outlets that were put in  
34 to be used for camping.

1 135. Edval Helle, Jr. testified as having personal knowledge of the property of the plaintiff,  
2 **Randy Helle**, resides and has his address as P.O. Box 248, Edmore, ND, 58330.

3 136. Randy Helle owns property near or adjacent to Devils Lake, in Ramsey County, North  
4 Dakota, in the Northshore Subdivision, legally described as:

5 **Plaintiffs' Exhibit 728**

6 Lot (5) FIVE, Block (1) ONE, North Shore Subdivision, according to the  
7 certified plat of record in the office of the Register of Deeds.

8 137. Randy Helle's property is completely flooded by the flooding from Devils Lake. This  
9 property initially started to flood in the fall of 1994, and was completely flooded in 1995 or  
10 1996. So, it has a low elevation range of about 1430.4 feet to 1430.7 feet. Its high elevation  
11 was between 1435.9 feet to 1437.8 feet. All of the lots are now fully covered with water.  
12 Additional damages to this property include loss of landscaping, electrical outlets, and sewer  
13 and water lines.

14 138. Plaintiff, **Donald Mertens ,d/b/a Lake Region Bait Ranch**, resides at 1313 Jana Place  
15 Northeast, Devils Lake, ND 58301.

16 139. Donald Mertens, d/b/a Lake Region Bait Ranch, had a Lease and Easement pertaining to  
17 property near or adjacent to Devils Lake in Ramsey County, North Dakota, legally described  
18 as:

19 **Plaintiffs' Exhibit 746**

20 Two (2) fish ponds located on a tract of land consisting of approximately two  
21 (2) acres, more or less, and located within the Northeast Quarter of the  
22 Southwest Quarter (NE1/4SW1/4) of Section Twelve (12) in Township One  
23 Hundred Fifty-three (153) North of Range Sixty-four (64) West.

24 **Plaintiffs' Exhibit 747**

25 Survey Map in Application for Fish Ponds

26 140. Donald Mertens, d/b/a Lake Region Bait Ranch's leased property including the ponds is  
27 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This leased  
28 property was flooded in May of 1997. The places this leased property at an elevation of not  
29 more than 1442 feet. Additional damages to this property include value of ponds (about  
30 three quarters acre each) for the use of live bait storage, including the walls on the outside,  
31 loss of minnows in the pond. Damages for loss of income, and for loss of use of the ponds  
32 are not separately compensable but may be factors to assess the value of the property and  
33 leasehold. See 26 AmJur 2d §304 p.689-690, and N.D.C.C. 32-15-22.

34 141. Plaintiffs, **Kenneth D. and Karen Tollefson** reside at 307 Dickenson Drive, Devils Lake,  
ND 58301.

1 142. Kenneth D. and Karen Tollefson own property near or adjacent to Devils Lake, legally  
2 described as:

3 **Plaintiffs' Exhibit 895**

4 The South half (S1/2) of the Northeast quarter (NE1/4), the West half (W1/2)  
5 of the Southeast quarter (SE1/4) and the Southeast quarter (SE1/4) of the  
6 Southwest quarter (SW1/4) of Section Ten (10); the South half (S1/2), less R.  
7 R., the Southeast quarter (SE1/4) of the Northwest quarter (NW1/4) and the  
8 Southwest quarter (SW1/4) of the Northeast quarter (NE1/4) of Section Fifteen  
9 (15); the North half (N1/2) of the Northwest quarter (NW1/4) and lots One (1)  
10 and Two (2) of Section Twenty-two (22), all in Township One Hundred Fifty-  
11 four (154) North, Range Sixty-six (66) west, Ramsey County, North Dakota.  
According to the Ramsey County Auditor this farm contains 725.96 acres,  
more or less.

12 **Plaintiffs' Exhibit 896**

13 In Ramsey County, North Dakota:

14 The North Half of the Northwest Quarter (N1/2NW1/4) and Lots One (1) and  
15 Two (2) of Section Twenty-two (22), Township One Hundred Fifty-four (154),  
Range Sixty-six (66)

16 **Plaintiffs' Exhibit 899**

17 In Ramsey County, North Dakota:

18 The South Half of the Northeast Quarter (S1/2NE1/4), the West Half of the  
19 Southeast Quarter (W1/2SE1/4) and the Southeast Quarter of the Southwest  
20 Quarter (SE1/4SW1/4) of Section Ten (10); in Township One Hundred Fifty-  
21 four (154) North, Range Sixty-six (66), West; and

22 The Southeast Quarter of the Northwest Quarter (SE1/4NW1/4); the Southwest  
23 Quarter of the Northeast Quarter (SW1/4NE1/4); and the South Half (S1/2)  
less railroad and also less the East Half of the Southeast Quarter (E1/2SE1/4)  
of Section Fifteen (15), Township One Hundred Fifty-four (154) North, Range  
Sixty-six (66) West.

24 The North Half of the Northwest Quarter (N1/2NW1/4) and Lots One (1) and  
25 Two (2), of Section Twenty-two (22); and the East Half of the Southeast  
26 Quarter (E1/2SE1/4) of Section Fifteen (15), all in Township One Hundred  
Fifty-four (154) North, Range Sixty-six (66) West.

27 It is recognized that Plaintiffs' Exhibit 896 and 899 re-describe the same property contained  
28 in Plaintiffs' Exhibit 895. These descriptions may also reflect additional interests conveyed  
29 or current interest of the plaintiff. It is not intended that plaintiffs seek to recover damages  
30 for any property except that described in Plaintiffs' Exhibit 895.

31 143. Kenneth D. and Karen Tollefson's property in Plaintiffs' Exhibit 895 is flooded and/or  
32 otherwise damaged by the flooding from Devils Lake. The property in Plaintiffs' Exhibit  
33 895 totals 725.96 acres. Of that, 400 acres are not flooded. However, it is all now  
34 surrounded by water and cannot be accessed for any beneficial use. It is an island. Kenneth

1 D. and Karen Tollefson's property in Plaintiffs' Exhibit 895 initially started to flood in April  
2 of 1994, with continual increased flooding to a few years before trial. So, this property's low  
3 elevation range was 1428.34 feet to 1429.26 feet. Plaintiffs, Kenneth D. and Karen  
4 Tollefson's additional damages include loss or damage to three steel bins, a wooden  
5 granary, and fences on the property in Plaintiffs' Exhibit 895.

6 144. Plaintiff, Elizabeth Hjelstad testified on behalf of **Marvin Logan Ranch, LLC**, who resides  
7 at 1000 - 20th Avenue Northwest, B5, Minot, ND 58703, as the President of Marvin Logan  
8 Ranch, LLC. Gary Hagland also testified on behalf of Marvin Logan Ranch, LLC. He  
9 resides at 2618 34<sup>th</sup> Avenue SW, Fargo, ND 58103, and established personal knowledge of  
10 the property owned by Marvin Logan Ranch, LLC.

11 145. Marvin Logan Ranch, LLC is a duly organized entity in the state of North Dakota. (See  
12 Plaintiffs' Exhibit 753, Certificate of Organization for Marvin Logan Ranch, LLC,  
13 Plaintiffs' Exhibit 754, Annual Report of Marvin Logan Ranch, and Plaintiffs' Exhibit 755,  
14 Initial Report of Marvin Logan Ranch.)

15 146. Plaintiff, Marvin Logan Ranch owns property near or adjacent to Devils Lake. All this land  
16 is connected and located on the southwest edge of Devils Lake. It is Lots, 1, 2, 3 and 5 of  
17 Section 16; Lots 1, 2, 3, 4 and 5 of Section 8; Lot 1 of Section 17; the Northwest Quarter of  
18 the Northeast Quarter of Section 17; Lot 5 of Section 5; Lot 3 of Section 9; and Lot 5 of  
19 Section 10, in Benson County, North Dakota and legally described as:

20 **Plaintiffs' Exhibit 752**

21 The South Half of the Northwest Quarter (S1/2NW1/4) of Section Three (3);  
22 Lots Two (2), Three (3), Eight (8) and Nine (9) and the Southeast Quarter of  
23 the Northwest Quarter (SE1/4NW1/4) of Section Four (4); the West Half of the  
24 Southeast Quarter (W1/2SE1/4), the Southwest Quarter of the Northeast  
25 Quarter (SW1/4NE1/4), and the Southeast Quarter of the Northwest Quarter  
26 (SE1/4NW1/4) of Section Five (5); the Northeast Quarter of the Northeast  
27 Quarter (NE1/4NE1/4), the West Half of the Northeast Quarter (W1/2NE1/4),  
28 and the Northwest Quarter of the Southeast Quarter (NW1/4SE1/4) of Section  
29 Eight (8); Lots Three (3), Four (4), Seven (7), and Eight (8), the West Half of  
30 the Northwest Quarter (W1/2NW1/4), and the Southwest Quarter (SW1/4) of  
31 Section Nine (9); the Southwest Quarter of the Northwest Quarter  
32 (SW1/4NW1/4), the Northwest Quarter of the Southeast Quarter  
33 (NW1/4SE1/4), the Northeast Quarter of the Southwest Quarter  
34 (NE1/4SW1/4), the Southeast Quarter of the Southwest Quarter  
(SE1/4SW1/4), the Southwest Quarter of the Southeast Quarter (SW1/4SE1/4),  
the Northwest Quarter of the Southwest Quarter (NW1/4SW1/4), and the  
Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Ten  
(10); the Northwest Quarter of the Northeast Quarter (NW1/4NE1/4), the  
Northeast Quarter of the Northwest Quarter (NE1/4NW1/4), and the Northwest

1 Quarter of the Northwest Quarter (NW1/4NW1/4) of Section Fifteen (15); the  
2 Northeast Quarter (NE1/4), the Southeast Quarter (SE1/4) and the Southwest  
3 Quarter (SW1/4) of Section Sixteen (16); the Northwest Quarter of the  
4 Northeast Quarter (NW1/4NE1/4) and the Northeast Quarter of the Northwest  
5 Quarter (NE1/4NW1/4) of Section Nineteen (19); the West Half of the  
6 Northeast Quarter (W1/2NE1/4) and the South Half of the Northwest Quarter  
7 (S1/2NW1/4) of Section Twenty (20); all in Township One Hundred Fifty-one,  
8 Range Sixty-five (151-65);

9 Lots Five (5) and Six (6), the Southwest Quarter of the Southeast Quarter  
10 (SW1/4SE1/4), the Southeast Quarter of the Southwest Quarter (SE1/4SW1/4),  
11 the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4), and the  
12 Northwest Quarter of the Southwest Quarter (NW1/4SW1/4) of Section Three  
13 (3), Lot One (1), the South Half of the Northeast Quarter (S1/2NE1/4), the  
14 North Half of the Southeast Quarter (N1/2SE1/4), the South Half of the  
15 Southeast Quarter (S1/2SE1/4), and the Southwest Quarter (SW1/4) of Section  
16 Four (4); the Northeast Quarter of the Southeast Quarter (NE1/4SE1/4), the  
17 South Half of the Southeast Quarter (S1/2SE1/4), the Southeast Quarter of the  
18 Southwest Quarter (SE1/4SW1/4), and the Southwest Quarter of the Southwest  
19 Quarter (SW1/4SW1/4) of Section Five (5); the North Half of the Northwest  
20 Quarter (N1/2NW1/4), the Southeast Quarter of the Northwest Quarter  
21 (SE1/4NW1/4), the Southwest Quarter of the Northwest Quarter  
22 (SW1/4NW1/4), the Southwest Quarter (SW1/4), the East Half of the  
23 Northeast Quarter (E1/2NE1/4), and the Southwest Quarter of the Northeast  
24 Quarter (SW1/4NE1/4) of Section Eight (8); the West Half of the Northwest  
25 Quarter (W1/2NW1/4), the Northeast Quarter of the Northwest Quarter  
26 (NE1/4NW1/4), the Northeast Quarter (NE1/4), the Northeast Quarter of the  
27 Southeast Quarter (NE1/4SE1/4), and the Southeast Quarter of the Southeast  
28 Quarter (SE1/4SE1/4) of Section Nine (9); the Southwest Quarter of the  
29 Northwest Quarter (SW1/4NW1/4), the Northwest Quarter of the Northwest  
30 Quarter (NW1/4NW1/4), the West Half of the Southwest Quarter  
31 (W1/2SW1/4), the East Half of the Northeast Quarter (E1/2NE1/4), the  
32 Southwest Quarter of the Northeast Quarter (SW1/4NE1/4), the Northwest  
33 Quarter of the Southeast Quarter (NW1/4SE1/4), and the East Half of the  
34 Southeast Quarter (E1/2SE1/4) of Section Ten (10); the North Half of the  
Northeast Quarter (N1/2NE1/4) of Section Fifteen (15); the Northwest Quarter  
of the Southeast Quarter (NW1/4SE1/4) and the Southwest Quarter of the  
Southeast Quarter (SW1/4SE1/4) of Section Seventeen (17); the East Half of  
the Southwest Quarter (E1/2SW1/4) and the West Half of the Southeast  
Quarter (W1/2SE1/4) of Section Nineteen (19); all in Township One Hundred  
Fifty-one, Range Sixty-six (151-66);

The West Half of the Southeast Quarter (W1/2SE1/4), the East Half of the  
Southwest Quarter (E1/2SW1/4) of Section One (1); the Southwest Quarter of

1 the Northeast Quarter (SW1/4NE1/4), the Northwest Quarter of the Northeast  
2 Quarter (NW1/4NE1/4) of Section Twelve (12); the Southeast Quarter (SE1/4)  
3 of Section Thirty-five (35); all in Township One Hundred Fifty-one, Range  
4 Sixty-seven (151-67);

5 The South Half of the Southeast Quarter (S1/2SE1/4) of Section Twenty-four  
6 (24); the Southeast Quarter of the Southeast Quarter (SE1/4SE1/4) of Section  
7 Twenty-five (25); all in Township One Hundred Fifty-two, Range Sixty-five  
8 (152-65);

9 Lot Five (5) of Section Ten (10); Lot Five (5) of Section Five (5); Lots One (1),  
10 Two (2), Three (3), Four (4) and Five (5) of Section Eight (8), Lot Three (3) of  
11 Section Nine (9); Lots One (1), Two (2), Three (3) and Five (5), the Southwest  
12 Quarter of the Northwest Quarter (SW1/4NW1/4), and the Southwest Quarter  
13 of the Southeast Quarter (SW1/4SE1/4) of Section Sixteen (16); Lot One (1)  
14 and the Northwest Quarter of the Northeast Quarter (NW1/4NE1/4) of Section  
15 Seventeen (17); the Southwest Quarter (SW1/4) of Section Twenty-three (23);  
16 the West Half of the Southwest Quarter (W1/2SW1/4) of Section Twenty-four  
17 (24); the West Half of the Southwest Quarter of the Southwest Quarter  
18 (W1/2SW1/4SW1/4) of Section Twenty-five(25); the Southwest Quarter  
19 (SW1/4) of Section Twenty-six (26); the Southeast Quarter of the Northeast  
20 Quarter (SE1/4NE1/4), the Northeast Quarter of the Southeast Quarter  
21 (NE1/4SE1/4) and the Southeast Quarter of the Southeast Quarter  
22 (SE1/4SE1/4) of Section Twenty-seven (27); the South Half of the Northeast  
23 Quarter (S1/2NE1/4) and the Southeast Quarter (SE1/4) of Section Thirty-one  
24 (31); the Southwest Quarter (SW1/4), the Southeast Quarter of the Southeast  
25 Quarter (SE1/4SE1/4) of Section Thirty-two (32); the Southwest Quarter of the  
26 Southeast Quarter (SW1/4SE1/4) of Section Thirty-three (33); the Southeast  
27 Quarter of the Northwest Quarter (SE1/4NW1/4), the Southwest Quarter of the  
28 Northwest Quarter (SW1/4NW1/4), the Southeast Quarter of the Northeast  
29 Quarter (SE1/4NE1/4), and the Southwest Quarter of the Northeast Quarter  
30 (SW1/4NE1/4) of Section Thirty-four (34); the South Half of the Northwest  
31 Quarter (S1/2NW1/4), the West Half of the Northeast Quarter (W1/2NE1/4),  
32 and the Southeast Quarter (SE1/4) of Section Thirty-five (35); all in Township  
33 One Hundred Fifty-two, Range Sixty-six (152-66).  
34

147. Marvin Logan Ranch, LLC's property at Lot 1, Section 16 totals 36.53 acres and is half  
flooded and/or otherwise damaged and the other half is inaccessible by public roads, so that  
the entire property is damaged by the Devils Lake floodwaters. This property at Lot 1 of  
Section 16 initially started to flood in June of 1994. So, it had a low elevation range of  
about 1429.86 feet to 1430.57 feet. It has gradually continued to flood up to the time of trial  
until half is covered. Additional damages to this property include loss of fences.

- 1 148. Marvin Logan Ranch, LLC's property at Lot 2, Section 16 is 8.2 acres and became totally  
2 flooded in June 1994, and/or otherwise damaged by the Devils Lake floodwaters. This  
3 means all of the acreage on this lot was at an elevation of 1429.86 feet to 1430.57 feet.  
4 Additional damages to this property include 100 yards of loss of fences.
- 5 149. Marvin Logan Ranch, LLC's property at Lot 3, Section 16 is 15.42 acres. It is now totally  
6 flooded and/or otherwise damaged by the flooding from Devils Lake. This property initially  
7 started to flood in June or July of 1995, and became totally flooded by the fall of 1995. This  
8 means this lot had an elevation range of 1435.27 feet to 1435.78 feet. Additional damages  
9 to this property include loss of a small farmstead, buildings, and corrals, which were totally  
10 destroyed by the actions of floodwaters of Devils Lake in 1997.
- 11 150. Marvin Logan Ranch, LLC's property at Lot 5, Section 16 is 38.35 acres. It is half flooded.  
12 The other half is inaccessible by public road and it can be accessed only over private  
13 property. Therefore, the property is completely flooded and/or damaged by the Devils Lake  
14 floodwaters. This property initially started to flood in June of 1997. this means it had a low  
15 elevation range of about 1442 to 1442.32 feet.
- 16 151. Marvin Logan Ranch, LLC's property at Lot 1, Section 8 is 31.74 acres. It is almost all  
17 completely flooded. The small portion above water is damaged in that it is a peninsula but  
18 is not accessible, because of the Devils Lake floodwaters. This property initially started to  
19 flood in June of 1994. So, it had a low elevation range of about 1429.86 feet to 1430.57  
20 feet. It has gradually continued to flood to its present condition a the time of trial.
- 21 152. Marvin Logan Ranch, LLC's property at Lot 2, Section 8 is 37.26 acres. It is fully flooded  
22 and damaged by the Devils Lake floodwaters. This property initially started to flood in June  
23 of 1994. So, it had a low elevation range of about 1429.86 feet to 1430.57 feet. It became  
24 fully flooded in July 1997. so, its high elevation was not more than 1442.97 feet.  
25 Additional damages to this property include loss of fencing.
- 26 153. Plaintiff, Marvin Logan Ranch, LLC's property at Lot 3, Section 8 is 35.26 acres. It is  
27 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. Only a few  
28 acres on the south side is above water but it is only accessible through private property.  
29 This property started to flood in June of 1994. That means the lot had a low elevation range  
30 of 1429.86 feet to 1430.57 feet. There was additional damage to loss of fencing.
- 31 154. Marvin Logan Ranch, LLC's property at Lot 4, Section 8 is 39.69 acres. About 2/3's is out  
32 of water but not accessible by public roadway. Therefore, this property is completely  
33 flooded and/or damaged by the Devils Lake floodwaters. This property initially started to  
34

1 flood in June of 1994. So, it had a low elevation range of 1429.86 feet to 1430.57 feet. The  
2 land has gradually continued to flood to its condition at trial.

3 155. Marvin Logan Ranch, LLC's property at Lot 5, Section 8 is 6.62 acres. It is totally flooded  
4 by the Devils Lake floodwaters. This property initially started to flood in June of 1995, and  
5 became totally flooded in June 1997. So, it had a low elevation range of 1435.26 feet to  
6 1435.57 feet. It's high elevation is no higher than 1442.34 feet.

7 156. Marvin Logan Ranch, LLC's property at Lot 1, Section 17 is 29.0 acres. Currently it is  
8 three-fourths flooded by the Devils Lake floodwaters. The remaining acreage is not  
9 damaged. This property initially started to flood in June of 1994. So, the property's low  
10 elevation was 1429.86 feet to 1430.51 feet. Additional damages to this property include  
11 loss of a pole barn, stockomatics and corrals.

12 157. Marvin Logan Ranch, LLC's property at Northwest Quarter of the Northeast Quarter of  
13 Section 17 is a 40 acre parcel. About 5 acres in the northeast corner have been flooded  
14 and/or otherwise damaged by Devils Lake floodwaters. This property at the Northwest  
15 Quarter of the Northeast Quarter of Section 17 initially started to flood in June of 1997. So,  
16 it had a low elevation range of 1442 feet to 1442.32 feet.

17 158. Marvin Logan Ranch, LLC's property at Lot 5, Section 5 is 6.78 acres. It is now totally  
18 flooded by the Devils Lake floodwaters. This property initially started to flood in June of  
19 1994, and became totally flooded in June 1995. This means it had a low elevation range of  
20 about 1429.86 feet to 1430.57 feet. It had a high elevation no higher than 1435.74 feet.  
21 Additional damages to Lot 5, Section 5 include loss of fencing.

22 159. Marvin Logan Ranch, LLC's property at Lot 3, Section 9 is 1.18 acres. It is totally flooded  
23 by the Devils Lake floodwaters. This property initially started to flood in June of 1994,  
24 when it was completely flooded. So, it had a low elevation of about 1429.86 feet and was  
25 no higher than 1430.57 feet. Additional damages to this property include loss of fencing.

26 160. Marvin Logan Ranch, LLC's property at Lot 5, Section 10 is 16.5 acres. It is totally  
27 flooded by Devils Lake floodwaters. This property initially started to flood in June of 1997,  
28 when it became completely flooded. So, its elevation was no lower than 1442 feet and no  
29 higher than about 1442.32 feet. Additional damages to this property include loss of fencing.

30 161. Plaintiffs, **Larry and Mary Englerth** reside at 1012 North Sycamore Avenue, Sioux Falls,  
31 SD 57101.

32 162. Larry and Mary Englerth own property near or adjacent to Devils Lake in Sunnyhill  
33 Subdivision on Six Mile Bay. It is set out on a plat (Plaintiffs' Exhibit 65). Their property  
34 is legally described as:

**Plaintiffs' Exhibit 712**

1 Lot Seven (7), Block One (1), Sunnyhills Subdivision Part of Section Twenty-  
2 seven (27) Township 154 North, Range 65 West, Ramsey County, North  
3 Dakota

4 **Plaintiffs' Exhibit 713**

5 Lot Thirteen (13) of Block One (1), Sunnyhills Subdivision, part of Section  
6 Twenty seven (27), Township One Hundred Fifty Four (154) North of Range  
7 Sixty Five (65) West, **Ramsey County, North Dakota.**

8 **Plaintiffs' Exhibit 714**

9 Lot Seven (7) and Lot Thirteen (13) of Block One (1), Sunnyhills Subdivision,  
10 part of Section Twenty-seven (27), Township One Hundred Fifty Four (154)  
11 North, Range Sixty five (65) west, **Ramsey County, North Dakota**

12 **Plaintiffs' Exhibit 715**

13 Lot Seven (7) and Lot Thirteen (13) of Block One (1), Sunnyhills Subdivision,  
14 part of Section Twenty-seven (27), Township One Hundred Fifty-Four (154)  
15 north, Range Sixty-five (65) west, Ramsey County, North Dakota.

16 163. Larry Englerth by his testimony established that he had personal knowledge of the affairs  
17 and property of Julie Englerth, who is deceased.

18 164. **Julie Englerth** owned property near or adjacent to Devils Lake in Sunnyhill Subdivision on  
19 Six Mile Bay. It is set out in a plat (Plaintiffs' Exhibit 651). It is legally described as:

20 **Plaintiffs' Exhibit 716**

21 Lot Six (6), Block One (1), Sunnyhills Subdivision part of Section Twenty-  
22 seven (27), Township 154 North, Range 65 West, Ramsey County, North  
23 Dakota

24 165. Lots 6 and 7 are adjacent to each other and Lot 13 is to the south 5 blocks. All three lots are  
25 of the same approximate depth. Lots 6 and 7 have a slightly greater gradient than Lot 13.  
26 At first when the three Englerths acquired this property there were several feet of grass or  
27 additional beach below the meander line.

28 166. Larry and Mary Englerth's property and the plaintiff Julie Englerth's property are  
29 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. All three  
30 lots belonging to the three Englerths initially started to flood past the meander line in the  
31 spring or mid summer of 1995. So, the elevation past the meander line of the lots was about  
32 1431 feet, but may have been as low as 1428 feet. All the lots became completely flooded in  
33 1997. So, the highest elevation of the three lots was about 1443 feet but may have been up  
34 to 1444 feet. Additional damages to Larry and Mary Englerth's property include loss of  
landscaping, trees, sewer, water, and a large storage shed.

167. Plaintiff, Lloyd Stromme testified for Stromme Brothers (Lloyd and Floyd Stromme) and  
established that he had personal knowledge of the property and affairs of property owned by

1 both Floyd and Lloyd Stromme. Lloyd resides at 4140 Fourth Avenue Southwest, Fargo,  
2 N.D.

- 3 168. Plaintiff, **Stromme Brothers** owned property in Ramsey County near or adjacent to Devils  
4 Lake in the Stromme Brothers Subdivision (namely Lots 3, 11, 12, 13, 14, 15, 16, 18, 21,  
5 22, 23, 24 and 25 in Block 1, Stromme Brothers Subdivision); the Stromme Brothers  
6 Second Addition (namely Lots 3, 4, 7, 8, and 9, Stromme Brothers Second Addition);  
7 legally described as:

8 **Plaintiffs' Exhibit 903 (Property with Stromme Brothers Subdivision)**

9 Lot Three (3), of Section Fifteen (15), Township One Hundred Fifty-three  
10 (153) North, of Range Sixty-four (64) West of the Fifth Principal Meridian,  
11 containing 21.60 acres more or less, subject to oil, gas and mineral reservations  
12 and easements as shown of record in the office of the Register of Deeds in and  
13 for Ramsey County, North Dakota, minus Lot Eight (8), of Block One (1) and  
14 Lots Two (2), Three (3), Four (4), Six (6), Eight (8) and Nine (9) of Block Two  
15 (2), Stromme Brothers Subdivision, located in Lot Three (3), of Section Fifteen  
16 (15), Township One Hundred Fifty-three (153) North, of Range Sixty-four (64)  
17 West of the Fifth Principal Meridian which lots have heretofore been conveyed  
18 to the said grantees herein.

19 (It is the intent of this instrument to include in this conveyance all of Block  
20 One (1) and all of Block Two (2) of the said Stromme Brothers Subdivision  
21 located in Lot Three (3) of Section Fifteen (15), Township One Hundred Fifty-  
22 three (153) North, of Range Sixty-four (64) West of the Fifth Principal  
23 Meridian; except those lots in said blocks which have heretofore been  
24 conveyed to the said Floyd Stromme and Lloyd Stromme by the grantors  
25 herein, subject to street and road right-of-ways laid out and established in the  
26 said Stromme Brothers Subdivision.)

27 **Plaintiffs' Exhibit 555 (Stromme Brothers Subdivision)**

28 Plat Map, Lot 3 Section 15 T153N R64

29 **Plaintiffs' Exhibit 904 (Property with Stromme Brothers Second Addition)**

30 A tract of land a part of Government Lot 2 of Section 15, Township 153 North  
31 of Range 64 West of the Fifth Principal Meridian, more particularly described  
32 as follows: Commencing at the Southeast corner of Lot 14 of Block 2 of  
33 Stromme Brothers Subdivision of Lot 3 of Section 15, Township 153 North of  
34 Range 64 West in Ramsey County, thence bearing N. 0°04' W. along the East  
line of said Lot 14, 275 feet, thence S. 89°39'E., 1321.98 feet to a point on the  
East line of Lot 2, Section 15 in Creel Township, thence S. 0°04' E., along  
said line 275 feet, thence N. 89°39' W., 1321.98 feet to the point of beginning.  
Said tract contains 8.35 acres, more or less, together with all riparian rights on  
the lake that may accrue to said property by reason of it being located on the  
meander line of Devils Lake. Subject to oil, gas and mineral interest transfers  
or reservations as shown of record.

**Plaintiffs' Exhibit 909 (Stromme Brothers Second Addition)**

OWNERS CERTIFICATE

KNOW all men by these presents that:

FLOYD A LLOYD STROMME have caused the following described tract of land to be surveyed and platted as STROMME BROTHERS 2ND ADDITION: Said tract is part of government Lot 2, Section 15, Township 153 North, Range 64 West, Ramsey County, North Dakota, more accurately described as follows: Commencing at the Southeast corner of lot 14, Block 2, STROMME BROTHERS SUBDIVISION of Lot 3, Section 15, Twp. 153 N. Rge 64W., Ramsey County; thence bearing N 0°04'W, along the East line of said lot 14, 275.00 feet; thence S 89°39'E, 1321.98 feet to a point on the East line of Lot 2, Section 15, said Creel Township; thence S 0°04'E, along said East line, 275.00 feet; thence N 89°39'W., 1321.98 feet, to the point of beginning. Said tract contains 8.35 acres more or less. All streets shown on the plat are dedicated to the public forever.

**Plaintiffs' Exhibit 906 (Lots deeded to Ramsey County)**

Lots 3, 11, 12, 13, 14, 15, 16, 18, 21, 22, 23, 24 & 25, Block 1, Stromme Brothers Subdivision located in Lot Three (3), Section Fifteen (15), Township One Hundred Fifty-three North (153N), Range Sixty-four West (64W), Ramsey County, North Dakota, and Lots 3, 4, 5, 7, 8 & 9, Stromme Brothers 2nd Subdivision, located in a part of Government Lot Two (2), Section Fifteen (15), Township One Hundred Fifty-three North (153N), Range Sixty-four West (64W), Ramsey County, North Dakota.

**Plaintiffs' Exhibit 907 (Lots deeded to Ramsey County, including Lot 6, Stromme Brothers Second Addition)**

Lots 3, 11, 12, 13, 14, 15, 16, 18, 21, 22, 23, 24 & 25, Block 1, Stromme Brothers Subdivision located in Lot Three (3), Section Fifteen (15), Township One Hundred Fifty-three North (153N), Range Sixty-four West (64W), Ramsey County, North Dakota, and Lots 3, 4, 6, 7, 8 & 9, Stromme Brothers 2<sup>nd</sup> Subdivision, located in a part of Government Lot Two (2), Section Fifteen (15), Township One Hundred Fifty-three North (153N), Range Sixty-four West (64W), Ramsey County, North Dakota.

169. Stromme Brothers' property described in Plaintiffs' Exhibit 906 and 907 is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood as to Stromme Brothers Subdivision in the Spring and Summer of 1997. So, its low elevation range was about 1437.9 feet to 1442.9 feet. It became completely flooded in 1997. So, its highest elevation was not greater than 1442.97 feet. As to the Stromme Brothers Second Addition, it began to flood in the spring of 1996. so, its low elevation range was about 1435.2 feet to 1437.58 feet. It became completely flooded in the summer of 1997. So, its highest elevation was not greater than 1442.97 feet. Additional damages to this property include Stromme Brothers Subdivision: loss of roads made and trees planted,

improvements, fixtures and a dock; as to Stromme Brothers Second Addition: loss of roads made, improvements and fixtures and two boat slits.

170. Plaintiff, Lloyd Stromme by his testimony established he had personal knowledge of the properties and affairs of Floyd Stromme, who owned property near or adjacent to Devils Lake in the Stromme Brothers Second Addition (Lot 6) and Ruggers Lake Addition (Lots 4 and 12). Floyd is now deceased and his wife Delores is successor to this property. The complaint was allowed to be amended to identify her as a plaintiff. This property is legally described as:

**Plaintiffs' Exhibit 801 (Property of Floyd Stromme)**

Lot 9 (Nine), Block 6 (Six), North Shore subdivision, according to the certified plat of record in the office of the Register of Deeds. **In Ramsey County, North Dakota.**

**Plaintiffs' Exhibit 911 (Ruggers Lakeshore Addition, Floyd Stromme)**

Lot Four (4) of Ruger's Lakeshore Addition, together with the riparian land adjacent to said Lot 4, all in Ramsey County, North Dakota, according to the plat of record in the office of the register of deeds of Ramsey County, North Dakota; and also Lot Twelve (12) of Ruger's Lakeshore Addition, together with the riparian land adjacent to said Lot 12, all in Ramsey County, North Dakota, according to the plat of record in the office of the register of deeds of Ramsey County, North Dakota.

171. Floyd Stromme's property described above in Plaintiffs' Exhibits 801 and 911, is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property started to flood as to Lot 7, Stromme Brothers Second Addition in the spring of 1996. So, it's low elevation range was about 1435.23 feet to 1437.58 feet. It became completely flooded in the summer of 1997. So, its highest elevation was not greater than 1442.97 feet. As to Ruggers Lakeshore Addition property, it started to flood in 1997. So, its lowest elevation was about 1438 feet. It completely flooded the same year. So, its highest elevation was not greater than 1442.97 feet. Additional damages to this property include the loss of a permanently constructed earth filled dock.

172. Plaintiff, Lloyd Stromme, owned property near or adjacent to Devils Lake in the Stromme Brothers Second Addition (Lot 5) and Ruggers Lake Addition (Lots 3 and 11), legally described as:

**Plaintiffs' Exhibit 905 (Property of Lloyd Stromme)**

Lot Five (5) of the Stromme Brothers Second Addition, a part of Government Lot Two (2) of Section Fifteen (15), Township One Hundred Fifty-three (153) North of Range Sixty-four (64) West in Ramsey County, North Dakota, according to the plat thereof on file and of record in the office of the Register of Deeds in and for Ramsey County, North Dakota, subject to all oil, gas and

1 mineral reservations or conveyances as is shown of record in the office of the  
2 Register of Deeds in and for Ramsey County, North Dakota, and further  
3 subject to utility easements and all road right-of-way easements as shown of  
4 record in the office of the Register of Deeds in and for Ramsey County, North  
5 Dakota.

6 **Plaintiffs' Exhibit 910 (Ruggers Lakeshore Addition, Lloyd Stromme)**

7 Lot Three (3) of Ruger's Lakeshore Addition, together with the riparian land  
8 adjacent to said Lot Three (3), all in Ramsey County, North Dakota, according  
9 to the plat of record in the office of the Register of Deeds of Ramsey County,  
10 North Dakota.

11 **Plaintiffs' Exhibit 912 (Ruggers Lakeshore Addition, Lloyd Stromme)**

12 Lot Eleven (11) Ruger's Lake Shore Addition according to the Certified plat  
13 thereof, Ramsey County, State of North Dakota.

14 173. This property described in Plaintiffs' Exhibit 905, 910 and 912 is completely flooded and/or  
15 otherwise damaged by the Devils Lake floodwaters. This property started to flood as to Lot  
16 5, Stromme Brothers Second Addition in the spring of 1996. So, its low elevation range  
17 was about 1435.2 feet to 1437.58 feet. It became completely flooded in the summer of  
18 1997. So, its highest elevation was not greater than 1442.97 feet. As to Ruggers Lakeshore  
19 addition property, it started to flood in 1997. So, its low elevation was about 1438 feet. It  
20 completely flooded in the same year. So, its highest elevation was not greater than 1442.97  
21 feet. Additional damages to this property include, but are not limited to the loss of  
22 permanently constructed earth filled dock. This is the same dock as and was owned together  
23 with Floyd Stromme.

24 174. Plaintiff, **Gregory Konzak** resides at 6941 - 54<sup>th</sup> Street Northeast, Penn, ND 58362.

25 175. Gregory Konzak owns property near or adjacent to Devils Lake in the Northwest Quarter,  
26 the West half of the Northeast Quarter and the North half of the Southwest Quarter of  
27 Section 28, Township 154, Range 66 (320 acres), in Benson County, North Dakota, legally  
28 described as:

29 **Plaintiffs' Exhibit 948**

30 The Northeast Quarter of the Southwest Quarter (NE1/4SW1/4); West One-  
31 half of the Northeast Quarter (W1/2NE1/4); Southeast Quarter of the  
32 Northwest Quarter (SE1/4NW1/4); North One-Half of the Northwest Quarter  
33 (N1/2NW1/4); the Southwest Quarter of the Northwest Quarter  
34 (SW1/4NW1/4); all in Section 28, Township 154, Range 66 W., containing  
320 acres more or less.

176. Gregory Konzak's property has 219 acres which are flooded and/or otherwise damaged, and  
101 acres are an island that is not accessible and is therefore completely damaged by the  
Devils Lake floodwaters. This property initially started to flood in June of 1994. So, its low  
elevation range was about 1429.86 feet to 1430.57 feet. It has continued to flood up to the

1 time of trial. So, the land that is flooded had an elevation not greater than 1449.5 feet.  
2 Additional damages to this property include lost fencing.

3 177. Gregory Konzak by his testimony established he had personal knowledge of the property  
4 and affairs of **Mavis Konzak** who resides at 1621 5<sup>th</sup> Street, Apt. #3, Devils Lake, ND  
5 58301.

6 178. Plaintiff, Mavis Konzak owns property near or adjacent to Devils Lake in Benson County,  
7 North Dakota, legally described as:

8 **Plaintiffs' Exhibit 942**

9 SW1/4NE1/4, W1/2SE1/4, SE1/4SE1/4, less RR Sec. 13, 154, 67.

10 SW1/4NW1/4 less RR, E1/2NW1/4, NW1/4NE1/4, NE1/4NE1/4, Lots 1, 2,  
& 3 and the SW1/4 less RR of Sec. 24, 154, 67.

11 NW1/4 less RW, Lots 1, 2, & 3 less RW, Sec. 25, 154, 67.

12 Lots 1, 2, 3 & 8, NW1/4SE1/4, Lots 4 & 7 of Sec. 19, 154, 66.

13 NE1/4NE1/4 & Lot 9 of Sec. 30, 154, 66.

14 NE1/4NE1/4 & Lot 9 of Sec. 30, 154, 66.

15 This property in Plaintiffs' Exhibit 942 was property Mavis' husband Peter obtained in a  
16 farm partnership dissolution. It is also set out with other property in Plaintiffs' Exhibit 943.

17 **Plaintiffs' Exhibit 943**

18 Lots 1, 2, 3 & 8, Sec. 19, Township 154 North, Range 66 West;

19 NE1/4NE1/4, Lot 9, Sec. 30, Township 154 North, Range 66 West;

20 NW1/4SE1/4, Lots 4 & 7, Sec. 19, Township 154 North, Range 66 West;

21 SW1/4, Sec. 24, Township 154 North, Range 67 West;

22 NW1/4, Sec. 25, Township 154 North, Range 67 West;

23 Lots 1, 2 & 3, Sec. 25, Township 154 North, Range 67 West;

24 SW1/4NE1/4, Sec. 13, Township 154 North, Range 67 West;

25 W1/2SE1/4, SE1/4SE1/4, Sec. 13, Township 154 North, Range 67 West;

26 SW1/4NW1/4, E1/2NW1/4, NW1/4NE1/4, Sec. 24, Township 154 North,

27 Range 67 West; NE1/4NE1/4, Lots 1, 2 & 3, Sec. 24, Township 154 North,  
28 Range 67 West;

29 This property in Plaintiffs' Exhibit 943 is property inherited by Mavis Konzak from her  
30 husband, Peter. So, it is this exhibit in which all of the property claimed by Mavis Konzak  
31 was taken or damaged where it is all described fully.

32 179. Mavis Konzak's property at Lot 1, Section 19 is approximately 50.00 acres. It is completely  
33 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
34 flood in June of 1994, when it became completely flooded. So, its low elevation range was  
between 1429.86 feet and 1430.57 feet. The latter is also its highest elevation. Additional  
damages to this property include loss of fences.

180. Mavis Konzak's property at Lot 2, Section 19 is approximately 100.00 acres. It is  
completely damaged. In the northeast corner there are a few acres above water but they are

not accessible due to the Devils Lake floodwaters. This property initially started to flood in June of 1994, when it became completely flooded. So, it had an elevation range of 1429.86 feet to 1430.57 feet for the flooded portion. Additional damages to this property include loss of fences.

181. Mavis Konzak's property at Lot 3, Section 19 is 40.00 acres. It is mostly under water and/or otherwise damaged. A few acres are essentially an island but are completely inaccessible by the Devils Lake floodwaters. Therefore, it is completely damaged. This property initially started to flood in June of 1994, when it became completely flooded or damaged. So, the portion that did flood had an elevation range of 1429.86 feet to 1430.57 feet.

182. Mavis Konzak's property at Lot 4, Section 19 is between 15 and 20 acres. It is totally inundated by the Devils Lake floodwaters. This property at Lot 4, Section 19 initially started to flood in June of 1994, when it became completely flooded. So, it had an elevation range of 1429.86 feet to 1430.57 feet.

183. Mavis Konzak's property at Lot 7, Section 19 is 80.00 acres. It is totally flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1994, when it became completely flooded. So, its elevation range was 1429.86 feet to 1430.57 feet.

184. Mavis Konzak's property at Lot 8, Section 19 is 80 acres. It is totally under water and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1994, when it became completely flooded. So, its elevation range was 1429.86 feet to 1430.57 feet.

185. Mavis Konzak's property at the Northwest Quarter of the Southeast Quarter of Section 19 is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1994, when it became completely flooded. So, it had an elevation range of 1429.86 feet to 1430.57 feet.

186. Mavis Konzak's property at the Northeast Quarter of the Southeast Quarter of Section 19 is mostly flooded. The rest of the property is inaccessible by the flooding from Devils Lake. This property initially started to flood in June of 1994, when it became almost completely flooded. So, the property flooded and has an elevation range of 1429.86 feet to about 1430.57 feet.

187. Mavis Konzak's property at Lot 8, Section 30 is 80.00 acres. It is completely flooded and/or damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1994, and became completely flooded in May or June 1995. So, its low elevation range was about 1429.86 feet to 1430.5 feet. Its highest elevation was not greater than 1435.74 feet.

- 1 188. Mavis Konzak's property at Lot 9, Section 30 is approximately 60.00 acres. It is under  
2 water and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
3 started to flood in June of 1994, when it became completely flooded. So, its elevation range  
4 was 1429.86 feet to 1430.57 feet.
- 5 189. Mavis Konzak's property at the Northeast Quarter of the Northeast Quarter of Section 30 is  
6 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
7 started to flood in June of 1994, when it became completely flooded. So, its elevation range  
8 was 1429.86 feet to 1430.57 feet.
- 9 190. Mavis Konzak's property at the Southwest Quarter of the Northeast Quarter and the West  
10 half of the Southeast Quarter all in Section 13, Township 154, Range 67 is completely  
11 damaged by the Devils Lake floodwaters. It is all flooded except for a small portion which  
12 is dry but inaccessible. This property initially started to flood in June of 1994, when it all  
13 became completely flooded or inaccessible. So, the flooded land had an elevation range of  
14 1429.86 feet to 1430.57 feet. Additional damages to this property includes loss of fences.
- 15 191. Mavis Konzak's property at Lot 1, Section 24, Township 154, Range 66 is approximately 60  
16 acres. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters.  
17 This property initially started to flood in June of 1994, and became completely flooded in  
18 June 1995. So, its low elevation range was 1429.86 feet to 1430.57 feet. Its highest  
19 elevation was not more than 1435.74 feet.
- 20 192. Mavis Konzak's property at Lot 2, Section 24 Township 154, Range 67 is approximately  
21 70.00 acres. It is flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
22 property initially started to flood in June of 1994, when it became completely flooded. So, it  
23 had an elevation range of 1429.86 feet to 1430.57 feet. Additional damages to this property  
24 include loss of fencing.
- 25 193. Mavis Konzak's property at the North half of the Northeast Quarter, Section 24 is partially  
26 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property at the  
27 North half of the Northeast Quarter, Section 24 initially started to flood in June of 1994, and  
28 has gradually continued to flood up to the time of trial. So, it had a low elevation range of  
29 about 1429.86 feet to 1430.57 feet. The high elevation of the land actually flooded is not  
30 greater than about 1449.2 feet.
- 31 194. Mavis Konzak's property at the Northeast Quarter of the Northwest Quarter of Section 24 is  
32 all flooded and/or otherwise damaged by the Devils Lake floodwaters. Only a very small  
33 portion is not flooded. This property initially started to flood in June of 1994, and has  
34 gradually continued to flood up to the time of trial. So, it has a low elevation range of

1 1429.86 feet to 1430.57 feet. Its high elevation of the land actually flooded is not greater  
2 than 1449.2 feet.

3 195. Mavis Konzak's property at the South half of the Northwest Quarter, Section 24 is flooded  
4 and/or otherwise damaged by the Devils Lake floodwaters, except for 15 acres in this parcel.  
5 This property initially started to flood in June of 1994, and has continued to flood up to the  
6 time of trial. So, it has a low elevation range of 1429.86 feet to 1430.57 feet. Its high  
7 elevation is not greater than 1449.2 feet for the land actually flooded.

8 196. Mavis Konzak's property at the Southwest Quarter, Section 24, is partially flooded and/or  
9 otherwise damaged by the Devils Lake floodwaters. The amount flooded and/or damaged is  
10 120 acres. The balance is not flooded or damaged. This property initially started to flood in  
11 June of 1994, and has continued to flood up to the time of trial. So, it has a low elevation  
12 range of 1429.86 feet to 1430.57 feet. Its high elevation is not greater than 1449.2 feet for  
13 the land actually flooded.

14 197. The property in Section 24 in the previous parcels that has not been flooded totals about 100  
15 acres. It is currently accessible by Highway 281. This highway may be shut down but no  
16 evidence has been presented to substantiate that it is more than a temporary situation. So,  
17 even with a temporary shut down, the plaintiffs have not proved that there has been damage  
18 to the 100 acres not flooded. This part of this plaintiff's claim is dismissed and it will be so  
19 ordered.

20 198. Mavis Konzak's property at Lot 1, Section 25 is approximately 50.00 acres. It is flooded  
21 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
22 flood in June of 1994, when it became completely flooded. So, it has an elevation range of  
23 1429.86 feet to about 1430.57 feet.

24 199. Mavis Konzak's property at Lot 2, Section 25 is approximately 78.00 acres. It is flooded  
25 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
26 flood in June of 1994 when it became completely flooded. So it has an elevation range of  
27 1429.86 feet to 1430.57 feet.

28 200. Mavis Konzak's property at Lot 3, Section 25 is approximately 60.00 acres. It is all flooded  
29 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
30 flood in June of 1994, when it became completely flooded. So, it has an elevation range of  
31 1429.86 feet to 1430.57 feet.

32 201. Mavis Konzak's property at the Northwest Quarter of Section 25, is partially flooded. A  
33 total of 110 acres are flooded by the Devils Lake floodwaters. The other 50 acres are not  
34 flooded but are inaccessible from their property or a public road and, therefore have suffered

1 damages. This property initially started to flood in June of 1994, and has gradually  
2 continued to flood up to the time of trial. So, it has a low elevation range of 1429.86 feet to  
3 1430.57 feet. Its high elevation is not greater than 1449.2 feet for that which is actually  
4 flooded.

5 202. Gregory Konzak by his testimony has established he has personal knowledge of the  
6 properties and affairs of the plaintiff, **Peter Konzak**, now deceased and who resided at 1621  
7 5<sup>th</sup> Street, Apt. #3, Devils Lake, ND 58301.

8 203. Peter Konzak (deceased) owned property near or adjacent to Devils Lake in Ramsey County,  
9 North Dakota, legally described as:

10 **Plaintiffs' Exhibit 944**

11 Northwest Quarter (NW1/4) of Section Eleven (11), in Township One Hundred  
12 Fifty-four (154) North, of Range Sixty-six (66) West of the Fifth Principal  
13 Meridian;

14 All that part of the East Half of the Southeast Quarter (E1/2SE1/4) of Section  
15 Ten (10), in Township One Hundred Fifty-four (154) North, of Range Sixty-  
16 five (65) West of the Fifth Principal Meridian, lying South of the Burlington  
17 Northern Railroad right-of-way, including the town site of Grand Harbor, lying  
18 South of said railroad right-of-way; subject to all conveyances for highway and  
19 road right-of-ways;

20 A parcel of land located in the Southwest Quarter (SW1/4) of Section Eleven  
21 (11), in Township One Hundred Fifty-four (154) North, of Range sixty-five  
22 (65) West of the Fifth Principal Meridian, described as follows:

23 Commencing at a point on the West boundary line of said Section Eleven (11)  
24 where said section line intersects the South boundary line of the Burlington  
25 Northern right-of-way; thence South on the section line to the South boundary  
26 line of said Section Eleven (11); thence East approximately 600 ft. on the  
27 South boundary line of said Section Eleven (11) to the proposed Channel "A"  
28 West right-of-way boundary; thence in a Northerly direction along the said  
29 West right-of-way boundary of the said proposed Channel "A" to the  
30 Burlington Northern Railroad South right-of-way line; thence in a Westerly  
31 direction along the said Burlington Northern Railroad right-of-way to the point  
32 of beginning; said property lying South of the Burlington Northern Railroad  
33 right-of-way and West of the proposed Channel "A" right-of-way; containing  
34 \_\_\_\_\_ acres, more or less.

It is recognized that this property (the second parcel description) in the East Half of the  
Southeast Quarter ( E1/2 SE1/4) of Section Ten (10), in Township One Hundred Fifty-four  
(154) North, of Range Sixty-five (65) West is not a part of this claim in the complaint.

204. The property, located only in the West half of Section Eleven (11), Ramsey County  
described above, is all flooded and/or otherwise damaged by the Devils Lake floodwaters.  
This property initially started to flood in June of 1994, and has generally continued to flood

up to the time of trial. There now remains only a 5 acre island that is dry but inaccessible. Based on this the property that has been flooded has a low elevation range of 1429.86 feet to 1430.57 feet. Its high elevation is not greater than 1449.2 feet as to the land actually flooded.

205. Gregory Konzak by his testimony established he had personal knowledge of the properties and affairs of the **Leo Konzak Trust**.

206. The Leo Konzak Trust **owns** property near or adjacent to Devils Lake, in Benson County, North Dakota and legally described as:

**Plaintiffs' Exhibit 740**

Lots One (1) and Two (2) of Section Twenty-six (26), in Township One Hundred Fifty-four (154) North, of Range Sixty-seven (67) West of the Fifth Principal Meridian; West Half of the Southeast Quarter (W1/2SE1/4) of Section Twenty-six (26), in Township One Hundred Fifty-four (154) North, of Range Sixty-seven (67) West of the Fifth Principal Meridian; Lots Four (4) and Five (5) of Section Twenty-four (24) and the West Half of the Northeast Quarter (W1/2NE1/4); and the Northeast Quarter of the Northeast Quarter (NE1/4NE1/4) of Section Twenty-five (25), in Township One Hundred Fifty-four (154) North, Range Sixty-seven (67) West of the Fifth Principal Meridian; Southeast Quarter of the Northeast Quarter (SE1/4NE1/4) of Section Twenty-five (25) in Township One Hundred Fifty-four (154) North, Range Sixty-seven (67) West, the North Half of the Northwest Quarter (N1/2NW1/4) of Section, Thirty-two (32), the South Half of the Southwest Quarter (S1/2SW1/4), the Northwest Quarter of the Southwest Quarter (NW1/4SW1/4), the Southwest Quarter of the Northwest Quarter (SW1/4NW1/4) and the North Half of the Northwest Quarter (N1/2NW1/4) of Section Twenty-nine (29); Government Lots Five (5) and Six (6) of Section Nineteen (19); Government Lots Three (3), Four (4) and Five (5) in Section Twenty (20); Government Lots One (1), Two (2), Five (5), Six (6), Seven (7) and Eight (8); the South Half of the Southeast Quarter (S1/2SE1/4) and Northeast Quarter of the Southwest Quarter (NE1/4SW1/4) of Section Thirty (30), all in Township One Hundred Fifty-four (154) North, Range Sixty-six (66) West of the Fifth Principal Meridian; The South Half of the Southwest Quarter (S1/2SW1/4) of Section Twenty-eight (28), the Northeast Quarter of the Northwest Quarter (NE1/4NW1/4) and the Northwest Quarter of the Northeast Quarter (NW1/4NE1/4) of Section Thirty-three (33) the Southeast Quarter (SE1/4) and East Half of the Northeast Quarter (E1/2NE1/4) of Section Twenty-nine (29); and the North Half of the Northeast Quarter (N1/2NE1/4) of Section Thirty-two (32), all in Township One Hundred Fifty-four (154) North, of Range Sixty-six (66) West of the Fifth Principal Meridian; Lots Nos. Five (5) and Six (6) of Section Twenty-six (26), in Township One Hundred Fifty-four (154) North, of Range Sixty-seven (67) West of the Fifth Principal Meridian; Reserving all oil, gas and other minerals

presently owned by Grantors and reserving right of ingress and egress for recreational and hunting purposes to Grantors.

**Plaintiffs' Exhibit 950**

West Half of the Northeast Quarter (W1/2NE1/4), Southeast Quarter of the Northwest Quarter (SE1/4NW1/4); and the Northeast Quarter of the Southwest Quarter (NE1/4SW1/4) of Section Twenty-nine (29), Township One Hundred Fifty-four (154) North of Range Sixty-six (66) West of the Fifth Principal Meridian; Benson County, North Dakota, subject to easements, conveyances and reservations of record.

**Plaintiffs' Exhibit 741**

Lots 3, 4, and 5 of Sec. 20; E1/2E1/2, W1/2W1/2, W1/2SE1/4, NE1/4NW1/4, SE1/4SW1/4 of Sec. 29, Twp. 154, Range 66; Lots 1, 2, 5, 6, 7 and 8, S1/2SE1/4, NE1/4SW1/4, Sec. 30, Twp. 154, Range 66; S1/2SW1/4 of Sec. 28; NE1/4NW1/4, NW1/4NE1/4, Sec. 33; N1/2N1/2 of Sec 32, Twp. 154, Range 66; SE1/4 of Sec. 26, Twp. 154, Range 67; S1/2, NE1/4 of Sec. 16, Lots 4 and 5, N1/2NE1/4, SW1/4NE1/4 of Sec. 21, Twp. 154, Range 66; S1/2SE1/4 of Sec. 24, NE1/4 of Sec. 25, Twp. 154, Range 67; Lots 5 and 6 and that area denoted as the Lake Bottom in Sec. 19 and the Lake Bottom in Sec. 20, Twp. 154, Range 66; and the W1/2NE1/4, SE1/4NW1/4, NE1/4SW1/4 of Sec. 29, Twp. 154, Range 66.

207. The property located at Lot 5, Section 20, is a 40.00 acre parcel. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June 1994, when it became completely flooded. So it had a low elevation of 1429.86 feet and a high elevation not greater than 1430.57 feet. Additional damages to this property includes loss of fencing.
208. The Leo Konzak Trust owns property located at Lot 6, Section 20. It is approximately 60.00 acres in size. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June 1994, when it became completely flooded. So, it has a low elevation of about 1429.86 feet and a high elevation not greater than 1430.57 feet. Additional damages to this property includes loss of fencing.
209. The Leo Konzak Trust has property located at Lot 3, Section 20. It is approximately 100.00 acres in size. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June 1994, when it became completely flooded. So, it has a low elevation of about 1429.86 feet and a high elevation not greater than 1430.57 feet. Additional damages to this property includes loss of fencing.
210. The Leo Konzak Trust has property located at Lot 4, Section 20. It is approximately 90.00 acres in size. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June 1994, when it became

- completely flooded. So, it has a low elevation of 1429.86 feet and a high elevation no greater than 1430.57 feet. Additional damages to this property includes loss of fencing.
211. The Leo Konzak Trust owns property located at Lot 5, Section 20. It is approximately 60.00 acres in size. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June 1994, when it became completely flooded. So, it has a low elevation of 1429.86 feet and a high elevation not greater than 1430.57 feet. Additional damages to this property includes loss of fencing.
212. The Leo Konzak Trust owns property located at the South half of the Southwest Quarter of Section 28. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property is 20 acres in size. Only a small knoll 20 feet across remained unflooded until 2003. Now it is all flooded. This property initially started to flood in June of 1994, and became completely flooded in 2003. So, it had a low elevation range of about 1429.86 feet to 1430.57 feet and a high elevation not exceeding 1447.52 feet except for the small knoll.
213. The Leo Konzak Trust owns property located at the Northwest Quarter of Section 29. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1994, and has continued to flood to the time of trial. Any portions not flooded are over small islands and not accessible. Based on the history of it flooding, this parcel had a low elevation range of about 1429.86 feet to 1430.57 feet. Its high elevation is not greater than 1449.2 feet for the flooded acreage. Additional damages to this property include loss of fencing.
214. The Leo Konzak Trust owns property at the Northeast Quarter of Section 29. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1994, and has continued to flood to the time of trial. Any portions not flooded are only small islands and are not accessible. Based on this history, the elevation range of this property is the same as the N.W. 1/4 of Sec. 29. Additional damages to this property include loss of fencing.
215. The Leo Konzak Trust owns property located at the Southeast Quarter of Section 29. The Northwest 40 acres is all flooded and the Northeast 40 acres is half flooded and/or damaged by the flooding from Devils Lake. So, a total of 60 acres is flooded. The remaining 100 acres is not flooded or damaged and is accessible. This property initially started to flood in June of 1994, and continued to flood to the time of trial. So, its low elevation range was 1429.86 feet to about 1430.57 feet for the flooded acreage. Its highest elevation is less than 1449.2 feet. Additional damages to this property include loss of fencing.

- 1 216. The Leo Konzak Trust owns property located at the Southwest Quarter of Section 29. It is  
2 all flooded and/or otherwise damaged by the Devils Lake floodwaters. Sixty (60) acres is  
3 flooded. The remaining 100 acres is an island and not accessible. This property initially  
4 started to flood in June of 1994, and continued to flood to the time of trial. So, it has a low  
5 elevation range of about 1429.86 feet to 1430.57 feet. Its high elevation is not greater than  
6 1449.2 feet for the acreage that is flooded.
- 7 217. The Leo Konzak Trust owns property located at Lot 1 of Section 30. It is 40.00 acres and is  
8 all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property  
9 initially started to flood in June of 1994, when it was completely flooded. So, it had an  
10 elevation range of 1429.86 feet to about 1430.57 feet. Additional damages to this property  
11 include loss of fencing.
- 12 218. The Leo Konzak Trust owns property located at Lot 2 of Section 30. It is 80.00 acres in  
13 size. It is partially flooded and/or otherwise damaged by the Devils Lake floodwaters. 55  
14 acres are flooded. 20 acres is an island and not accessible. Five acres are not damaged. This  
15 property initially started to flood in June of 1994, and became fully flooded, inaccessible or  
16 damaged in June 1995. So the elevation range of the property was a low of 1429.86 feet to  
17 1430.57 feet. The high elevation of most of the flooded land is not greater than 1435.74  
18 feet.
- 19 219. The Leo Konzak Trust owns property located at Lot 5 of Section 30. It is 60 acres in size. It  
20 is all flooded and/or damaged by the Devils Lake floodwaters. The land is either flooded or  
21 an island and not accessible. This property initially started to flood in June of 1994, and  
22 continued to flood at the time of trial. So, it has a low elevation range of 1429.86 feet to  
23 1430.57 feet. Its high elevation is not greater than 1449.5 feet for land actually flooded.
- 24 220. The Leo Konzak Trust owns property located at Lot 6 of Section 30. It is an 80.00 acre  
25 parcel and is all flooded and/or damaged by the Devils Lake floodwaters. This property  
26 initially started to flood in June of 1994, and became completely flooded or otherwise  
27 damaged in spring 1997. So, its low elevation range was about 1429.86 feet to 1430.57 feet.  
28 Its high elevation was not greater than about 1442.3 feet. Additional damages to this  
29 property include the loss of fences.
- 30 221. The Leo Konzak Trust owns property located at Lot 7 of Section 30. It is a 60.00 acre  
31 parcel. It is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
32 property initially started to flood in June of 1994, when it became completely flooded. So, it  
33 has an elevation range of 1429.86 feet to about 1430.57 feet. Additional damages to this  
34 property include loss of fences.

- 1 222. The Leo Konzak Trust owns property located at Lot 8 of Section 30. It is a 90.00 acre  
2 parcel. It is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
3 property initially started to flood in June of 1994, and it became completely flooded in 1995.  
4 So, it had a low elevation range of 1429.86 feet to 1430.05 feet. Its high elevation did not  
5 exceeding 1435.5 feet. Additional damages to this property include the loss of fences.
- 6 223. The Leo Konzak Trust owns property located at the Northeast Quarter of the Southwest  
7 Quarter of Section 30. It is all flooded and/or otherwise damaged by the Devils Lake  
8 floodwaters. This property initially started to flood in June of 1995, and became completely  
9 flooded in March or April 1998. So, its low elevation range was about 1435.27 feet to  
10 1435.74 feet. Its high elevation did not exceed 1444.25 feet. Additional damages to this  
11 property include the loss of fences.
- 12 224. The Leo Konzak Trust owns property located at the South half of the Southeast Quarter of  
13 Section 30. It is all flooded and/or otherwise damaged by the Devils Lake floodwaters.  
14 This property initially started to flood in June of 1995, and became completely flooded by  
15 the end of June 1995. so, its elevation range was 1435.27 feet to 1435.74 feet. Additional  
16 damages to this property include loss of fences.
- 17 225. The Leo Konzak Trust owns property located at the North half of the Northwest Quarter of  
18 Section 32. It is partially flooded and/or otherwise damaged by the Devils Lake  
19 floodwaters. The corner 40 acres are all flooded. In the northeast corner about 20 acres are  
20 flooded and 10 acres are not accessible. The remaining acreage is so small, it has some  
21 degree of diminished value. This property initially started to flood in June of 1994, and  
22 continued to flood up to the time of trial. So, it has a low elevation range of about 1429.86  
23 feet to 1430.57 feet. Its high elevation is not greater than 1449.2 feet.
- 24 226. The Leo Konzak Trust owns property located at the North half of the Northeast Quarter of  
25 Section 32. Five acres are flooded by the Devils Lake floodwaters. The remaining 75 acres  
26 are not flooded or damaged and are accessible. This property initially started to flood in  
27 June of 1994, and has continued to gradually flood. So, its low elevation range was 1429.86  
28 feet to 1430.57 feet. Its high elevation did not exceed 1449.2 feet for the land actually  
29 flooded.
- 30 227. The Leo Konzak Trust owns property located at the Northeast Quarter of the Northwest  
31 Quarter of Section 33 and the Northwest Quarter of the Northeast Quarter of Section 33. It  
32 is all flooded and/or otherwise damaged by the Devils Lake floodwaters. Only about one  
33 acre is not flooded but it is not accessible. This property initially started to flood in June of  
34

1 1995 when it became completely flooded or inaccessible. So, its elevation range was a low  
2 of about 1435.27 feet and a high no greater than 1435.74 feet.

3 228. The Leo Konzak Trust owns property located at Government Lot 4 of Section 24. It is  
4 approximately 70 acres in size and is all flooded by the Devils Lake floodwaters. This  
5 property initially started to flood in June of 1994, when it became completely flooded. So, it  
6 had an elevation range of 1429.86 feet to about 1430.57 feet. Additional damages to this  
7 property include loss of fences.

8 229. The Leo Konzak Trust owns property located at Government Lot 5 of Section 24. It is  
9 approximately 15-20 acres in size. It is all flooded and/or otherwise damaged by the Devils  
10 Lake floodwaters. There is a small strip of land not covered by water but it is an island and  
11 is not accessible. This property initially started to flood in June of 1994, and became  
12 completely flooded or inaccessible in June 1995. So, its low elevation range was about  
13 1429.86 feet to 1430.57 feet. Its high elevation for the land actually flooded was not greater  
14 than 1435.74 feet. Additional damages to this property include loss of fences.

15 230. The Leo Konzak Trust owns property located at the Northeast Quarter of Section 25. It is  
16 all flooded and/or otherwise damaged by the Devils Lake floodwaters. There are some  
17 small plats that are not flooded and are accessible. But with the size of them, they are of  
18 less value and so they too have been damaged. This property at the Northeast Quarter of  
19 Section 25 initially started to flood in June of 1994, and has gradually flooded to the time of  
20 trial. So, it has a low elevation range of about 1429.86 feet to 1430.57 feet. Its high  
21 elevation does not exceed 1449.2 feet for the acreage actually flooded. Additional damages  
22 to this property include loss of fences.

23 231. Leo Konzak Trust owns property at the West half of the Southeast Quarter of Section 26.  
24 Its all flooded and/or otherwise damaged by the flooding from Devils Lake. This property  
25 initially started to flood in June of 1994, and became completely flooded in June, 1997. So,  
26 it has a low elevation range of about 1429.86 feet to 1430.57 feet. Its high elevation is not  
27 greater than 1442.34 feet. Additional damages to this property include the cost of house  
28 moved, loss of barns, corrals, wells, and the loss of use of the entire farm site.

29 232. Matthew Jager established by his testimony, knowledge of the property of the plaintiffs, for  
30 **Joe E. and Roseanne Jager**. Roseanne Jager resides at 4225 Backus Road, Mojave, CA  
31 93501 and Matthew Jager resides at 1131 7<sup>th</sup> Street NE, Devils Lake, ND 58301. Joe E. and  
32 Roseanne Jager own property near or adjacent to Devils Lake, legally described as:

33 **Plaintiffs' Exhibit 695**

34 Lot One (1), Block Two (2), Stromme Brothers Subdivision, located in Lot  
Three (3) of Section Fifteen (15), Township One Hundred Fifty-three (153)

North, of Range Sixty-four (64) West of the Fifth Principal Meridian, in accordance with the plat thereof on file and of record in the office of the Register of Deeds in and for Ramsey County, North Dakota, subject to all oil, gas and mineral reservations and easements as shown of record in the office of the Register of Deeds in and for Ramsey County, North Dakota.

233. Joe E. and Roseanne Jager's property is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in the summer of 1994. So, the property's low elevation range was 1429.86 feet to 1430.5 feet. It continued flooding gradually with the increased lake level of Devils Lake until it is now all flooded. It was all fully flooded by around the winter of 2004 (January-February). So the high elevation of the property was about 1446.4 feet..

234. Plaintiffs, **Gary and Helen Armstrong** reside at 222 Sunny Hills Drive South, Devils Lake, ND 58301. Gary and Helen Armstrong own property near or adjacent to Devils Lake in the County of Ramsey, State of North Dakota, legally described as:

**Plaintiffs' Exhibit 652**

Lot Twelve (12) of Block One (1), Sunnyhills Subdivision, part of Section Twenty seven (27), Township One Hundred Fifty Four (154) North of Range Sixty Five (65) West,

**Plaintiffs' Exhibit 651**

Topography Map

235. Gary and Helen Armstrong's property is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1994, and continued to have additional flooding until it was completely flooded in June of 1997. So, its low elevation range was about 1429.86 feet to 1430.57 feet. Its high elevation was not greater than 1442.5 feet. Additional damages include loss of the septic system, a couple of buildings that had to be moved off, and landscaping.

236. Plaintiffs, **Barry D. And Judy M. Cox** reside at 3948 - 88<sup>th</sup> Avenue NE, Warwick, ND 58381.

237. Barry D. and Judy M. Cox own property near or adjacent to Devils Lake, legally described as:

**Plaintiffs' Exhibit 917**

An undivided one half (1/2) interest in the to the following:

Lot one (1) of Section Nine (9) Lots One (1), Two (2), Three (3), Four (4) and Five (5), and the South Half of the Southeast Quarter (S1/2SE1/4) of Section Ten (10); The Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) and Lots Three (3), Four (4) and Five (5) of Section Eleven (11); The Southwest Quarter (SW1/4) of Section Fourteen; (14); The Southwest Quarter of the Northwest Quarter (SW1/4NW1/4), the South Half of the Northeast Quarter

(S1/2NE1/4) and the Southwest Quarter of the Southeast Quarter (SW1/4SE1/4) of Section Fourteen (14); The Northeast Quarter of the Northeast Quarter (NE1/4NE1/4) (also known as Lot One) of Section Sixteen (16); The Southwest Quarter (SW1/4), the Southwest Quarter of the Northwest Quarter (SW1/4NW1/4), the Southwest Quarter of the Northeast Quarter (SW1/4NE1/4) the East Half of the Northwest Quarter (E1/2NW1/4) of Section Twenty three (23); and The North Half of the Northwest Quarter (N1/2NW1/4) of Section Twenty six (26) all located in Township One Hundred Fifty two (152) North of Range Sixty three (63) West, Benson County, North Dakota.

**Plaintiffs' Exhibit 918**

Benson County, North Dakota

The Southwest Quarter of the Southwest Quarter (SW1/4SW1/4); and Lots Two (2), Three (3), Four (4), and Five (5) of Section Eleven (§11); the Southwest Quarter (SW1/4), Lots One (1) and Two (2), the South Half of the Northeast Quarter (S1/2NE1/4), and the Southwest Quarter of the Southeast Quarter (SW 1/4 SE 1/4) of Section Fourteen (§14); the West Half (W1/2), and the West Half of the Northeast Quarter (W1/2NE1/4) of Section Twenty-Three (§23); and the North Half of the Northwest Quarter (N1/2NW1/4) of Section Twenty-Six (§26), all in Township One Hundred Fifty-Two (Twp. 152), Range Sixty-Three (R. 63).

238. Barry D. and Judy M. Cox's property at the Southwest Quarter of the Southwest Quarter of Section 11, Township 152, Range 63, is approximately 40 acres in size. It is completely flooded except for about two acres. This remaining acreage is a narrow strip and is usable only because plaintiff rents the adjacent land. So it has some diminished value and is otherwise damaged by the flooding from Devils Lake. This property initially started to flood in May of 1995. Now, all but a couple of acres are under water. The land that is flooded reached that level in the summer of 2006. So, the low elevation range of the property is 1433.83 feet to 1435.26 feet. Its high elevation of the land flooded does not exceed 1449.2 feet. Additional damages include loss of fencing.
239. Barry D. and Judy M. Cox's property at Lot 3 of Section 11 is 47.2 acres in size. It is completely flooded except for one or two acres. This unflooded acreage is so isolated that it also has diminished value and is otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1995. The portion now flooded became flooded in June of 1996. So, the low elevation range of this property was about 1433.83 feet to 1435.26 feet. Its high elevation of that part flooded was around 1437.7 feet. Additional damages to this property include lost fencing.

- 1 240. Barry D. and Judy M. Cox's property at Lot 4 of Section 11 is 3.5 acres in size. It is  
2 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
3 property initially started to flood and became completely inundated in May of 1995. So, it  
4 has an elevation range of about 1433.83 feet to 1435.26 feet. Additional damages to this  
5 property include lost fencing.
- 6 241. Barry D. and Judy M. Cox's property at Lot 5 of Section 11, is 18.5 acres in size. It is  
7 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
8 property initially started to flood and became completely inundated in May of 1995. So, its  
9 elevation range was about 1433.83 feet to 1435.26 feet. Additional damage to this property  
10 include lost fencing.
- 11 242. Barry D. and Judy M. Cox's property at the Southwest Quarter of the Southeast Quarter of  
12 Section 14 is 40 acres in size. Of this, 35 acres are completely flooded by the Devils Lake  
13 floodwaters.. The remaining 5 acres are not damaged and are still usable as pasture. This  
14 property initially started to flood in May of 1995, and continued to flood through the spring  
15 of 2006. So, its low elevation range was 1433.83 feet to 1435.26 feet. It's high elevation  
16 was not greater than 1449.2 feet. Additional damages to this property include lost fencing.
- 17 243. Barry D. and Judy M. Cox's property at Lot 1 of Section 14, is 28.4 acres in size. It is  
18 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
19 property initially started to flood in May of 1995, and the flooding gradually increased until  
20 the property was completely flooded in June of 1996. So, its low elevation range was  
21 1433.83 feet to 1435.26 feet. Its high elevation was not greater than 1437.72 feet.  
22 Additional damages to this property include lost fencing.
- 23 244. Barry D. and Judy M. Cox's property at Lot 2 of Section 14, is 19.7 acres in size. It is  
24 totally flooded and/or damaged by the Devils Lake floodwaters. This property initially  
25 started to flood in May of 1995. The flooding gradually increased until the property was  
26 completely flooded in June of 1996. So, its low elevation range was 1443.83 feet to  
27 1435.26 feet. Its high elevation was not greater than 1437.72 feet.
- 28 245. Barry D. and Judy M. Cox's property at the South half of the Northeast Quarter of Section  
29 14 is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
30 property at the South half of the Northeast Quarter of Section 14 initially started to flood in  
31 May of 1995, and gradually increased until the property was completely flooded in July of  
32 1997. So, its low elevation range was 1433.83 feet to 1435.26 feet. Its high elevation was  
33 not greater than 1442.97 feet. Additional damages to this property include lost fencing.  
34

1 246. Barry D. and Judy M. Cox's property at the Northeast Quarter of the Northeast Quarter of  
2 Section 23 is 40 acres in size. All but 6 acres are completely flooded by the Devils Lake  
3 floodwaters. The remaining 6 acres are usable and not damaged. This property initially  
4 started to flood in May of 1995. so, as to that portion now flooded, its low elevation range  
5 was 1433.83 feet to 1435.26 feet. Its high elevation was not greater than 1449.2 feet.  
6 Additional damages to this property include lost fencing.

7 247. Barry Cox by his testimony established that he had knowledge of the property of the  
8 plaintiff, **Margaret R. Cox**. Margaret R. Cox resides at 3775 East Lake Road, Crary, ND  
9 58327.

10 248. Plaintiff, Margaret R. Cox owns property near or adjacent to Devils Lake in Odessa  
11 Township, Ramsey County, State of North Dakota, legally described as:

12 **Plaintiffs' Exhibit 919**

13 North Half of the Northeast Quarter (N1/2NE1/4), Southeast Quarter of the  
14 Northeast Quarter (SE1/4NE1/4), and the Northeast Quarter of the Southeast  
15 Quarter (NE1/4SE1/4), in Section Twenty-eight (28); the Northwest Quarter  
16 (NW1/4) in Section Twenty-seven (27); the North Half (N1/2) and the  
17 Southwest Quarter (SW1/4) in Section Twenty-two (22); the Southeast Quarter  
18 of the Southeast Quarter (SE1/4SE1/4) in Section Twenty-one (21); the North  
19 Half of the Southwest Quarter (N1/2SW1/4), the Northwest Quarter of the  
20 Southeast Quarter (NW1/4SE1/4), the South Half of the Southeast Quarter  
21 (S1/2SE1/4) and the Southeast Quarter of the Southwest Quarter  
(SE1/4SW1/4) in Section Fifteen (15), All in Township One Hundred Fifty-  
two (152) North, of Range Sixty-two (62) West of the Fifth Principal Meridian

22 249. Margaret R. Cox's property at the South half of the Southwest quarter of Section 22 is 80  
23 acres in size. It is completely flooded and/or otherwise damaged by the Devils Lake  
24 floodwaters. This property initially started to flood in May of 1995, and gradually continued  
25 to flood through August of 2006. So, its low elevation range was 1433.83 feet to 1435.26  
26 feet. Its high elevation did not exceed 1449.2 feet.

27 250. Plaintiffs, **Daniel M. and Doreen Webster** reside at 5351 - 73<sup>rd</sup> Avenue NE, Penn, ND  
28 58362.

29 251. Daniel M. and Doreen Webster own property near or adjacent to Devils Lake, in the County  
30 of Ramsey, State of North Dakota. It is generally to the east and slightly south of Lake  
31 Irvine and straight south of Lake Alice. It is north of Highway 2. It is legally described as:

32 **Plaintiffs' Exhibit 934**

33 The Northeast Quarter (NE1/4) of Section Four (4), Township One Hundred  
34 Fifty-five (155), Range Sixty-six (66), consisting of approximately 156.6  
tillable acres; and

1 The Northwest Quarter (NW1/4) of Section Three (3), Township One Hundred  
2 Fifty-five (155), Range Sixty-six (66), consisting of 146 tillable acres.

3 **Plaintiffs' Exhibit 935**

4 Northeast Quarter of the Southeast Quarter (NE1/4SE1/4) of Section 3; the  
5 South Half of the Northeast Quarter (S1/2NE1/4) and Lots One (1) and Two  
6 (2) of Section 3; all in Township 155, Range 66 West of the Fifth Principal  
Meridian, containing 200 acres, more or less.

7 **Plaintiffs' Exhibit 936**

8 The Southwest Quarter (SW1/4), the South Half of the Northwest Quarter  
9 (S1/2NW1/4) and Lots Three (3) and Four (4) of Section Two (2), Township  
10 One Hundred Fifty-five (155) North of Range Sixty-six (66) West of the Fifth  
Principal Meridian, in Ramsey County, North Dakota.

- 11 252. Daniel M. and Doreen Webster's property at the Northeast Quarter of Section 4 is 165 acres  
12 in size. In this parcel 160 acres are completely flooded by Devils Lake floodwaters. The  
13 remaining five acres are not accessible and are therefore damaged by the Devils Lake  
14 floodwaters. This property initially started to flood in April or May of 1994. The flooding  
15 gradually increased until all but 5 acres of the property were completely flooded in April or  
16 May of 1997. So, the low elevation range of the property was 1428.34 feet to 1429.87 feet.  
17 The high elevation of most of the flooded property does not exceed 1442 feet but all of that  
18 which is flooded is below 1449.2 feet.
- 19 253. Daniel M. and Doreen Webster's property at the North half of Section 3 is completely  
20 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
21 started to flood in April or May of 1994. The flooding gradually increased until April or  
22 May of 1999 when all of it is now flooded except a portion that is an island and not  
23 accessible for use. Based on this, the low elevation range of the property was 1428.34 feet  
24 to 1429.87 feet. The high elevation of the flooded land was not greater than 1449.2 feet  
25 with most of it below 1446.85 feet. Additional damages to this property include the loss of  
26 their whole farmstead and buildings (which was in the Southeast Quarter of the Northeast  
27 Quarter of Section 3), the cost of removing 14 buildings (less insurance compensation  
28 received) the loss of the buildings that were burnt and all the infrastructure actually existing  
29 with the farmstead was lost, including trees.
- 30 254. Daniel M. and Doreen Webster's property at the Northeast Quarter of the Southeast Quarter  
31 of Section 3 is completely flooded and/or otherwise damaged by the Devils Lake  
32 floodwaters. This property initially started to flood in April or May of 1997. It is now  
33 completely inundated. So, its low elevation range was 1438 feet to 1442.03 feet. Its high  
34 elevation is not greater than 1449.2 feet. Additional damages to this property include, loss  
of planted trees.

1 255. Daniel M. and Doreen Webster's property at the Northwest Quarter Section 2 is completely  
2 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property at the  
3 Northwest Quarter of the West half of Section 2 initially started to flood in April or May of  
4 1997, and gradually continued to flood until it came to be completely inundated in April or  
5 May of 2000. So, its low elevation range was 1438 feet to 1442.03 feet. Its high elevation  
6 was not greater than 1446.3 feet.

7 256. Daniel M. and Doreen Webster's property at the Southwest Quarter of Section 2 has 80  
8 acres that are not flooded or damaged. The rest is flooded and/or otherwise damaged by the  
9 Devils Lake floodwaters. This property initially started to flood in April or May of 1997,  
10 and gradually continued to flood until April or May of 2000, when all but 80 acres became  
11 flooded. So, the low elevation range of this property was 1438 feet to 1442.03 feet. The  
12 high elevation of the flooded acreage does not exceed 1446.3 feet.

13 257. Defendants claim this plaintiff's claim was not brought within the statute of limitations. On  
14 Section 3 of their property Daniel M. and Doreen Webster maintained a dike built by  
15 Daniel's father decades ago to hold back waters from his land due to overland flooding,  
16 although he acknowledged that at time it was also to hold back water from Lake Irvine.  
17 Excess water on his side of the dike would be pumped by Webster over it. This water  
18 would eventually drain into Lake Irvine. By his testimony this plaintiff was able to  
19 distinguish the past overland flooding he explained from the current flooding of his property  
20 caused by the increased volume of Devils lake and its backing up the Mauvis Coulee and  
21 consuming Lake Irvine and Lake Alice as well as his property.

22 Daniel M. Webster and Doreen Webster were not original plaintiffs. They brought their  
23 claims for the property described above through the amended complaint filed on December  
24 9, 1999. Based on the legal conclusions determined by this trial court in its Memoranda  
25 Decision and Order Granting Motions for Partial Summary Judgment - Statute of  
26 Limitations dated April 1, 2005, this plaintiff was required to commence his action on his  
27 claim for inverse condemnation against the state defendants within 3 years and against the  
28 other government defendants within six years.

29 As held in that decision, the time when this plaintiff's action accrued is based on the  
30 discovery rule. As stated in Wall v. Lewis 393 N.W. 2d 758, 761 (N.D. 1986):

31 *The statute begins to run when the plaintiff knows, or with reasonable*  
32 *diligence should know of (1) the injury, (2) its cause, and (3) the*  
33 *defendant's possible negligence . . .*

34 In the amended complaint filed December 9, 1999, these plaintiff's claimed their properties  
began to flood in May of 1997 (amended complaint ¶312). By Daniel Websters' own

1 testimony, however, which is undisputed, this court finds that as to the Northeast quarter,  
2 Section 4, Township 155, Range 66, and the North one-half of Section 3, Township 155,  
3 Range 66 that these properties began to flood in April or May of 1994. In the pre-trial  
4 motions made by defendants for partial summary judgment, evidence was presented relating  
5 to public knowledge well known long ago that an alleged cause for the Devils Lake flooding  
6 was the implementation of these different water projects now cited in this complaint. Much  
7 of this evidence came from attached news articles or publications attached to plaintiffs' own  
8 affidavits. This court determined that this evidence established a sufficient and  
9 uncontradicted conclusion that plaintiffs knew that a possible cause of the flooding that they  
10 had experienced on their property was from the implementation of one or more of these  
11 water projects. (See Memoranda Decision and Order Terminating Motions for Partial  
12 Summary Judgment Statute of Limitations dated April 2, 2005 at p.6-8).

13 This plaintiff has admitted his knowledge of at least some of these projects and even  
14 participation in them. However, no evidence is present in the trial record of this plaintiff's  
15 awareness that a potential cause of his flooding that he began to experience in 1994 may  
16 have been related to these projects. None of these news articles or publications or this  
17 plaintiff's awareness of them were received into evidence in the trial. There is no trial  
18 testimony cited of the plaintiff that he recognized these water projects were a possible cause  
19 of the flooding and when he concluded that.

20 Based on all the above, this court finds defendants have not established at trial that this  
21 plaintiff has failed to bring his action within the statute of limitations.

22 258. Plaintiff, **Jason Bednarz and Brenda Bednarz** reside at 1705 - 26<sup>th</sup> Street SW, Devils  
23 Lake, ND 58301.

24 259. Jason Bednarz and Brenda Bednarz own property in Ramsey County near or adjacent to  
25 Devils Lake, legally described as:

26 **Plaintiffs' Exhibit 646**

27 Lot Twenty-eight (28), Woodland Place Subdivision located in Sections  
28 Twelve (12) and Thirteen (13), Township One Hundred Fifty-three (153),  
Range Sixty-five (65), Ramsey County, North Dakota.

29 Subject to all restrictions, easements and rights of way of record in the Office  
30 of the Register of Deeds, Ramsey County, North Dakota.

31 **Plaintiffs' Exhibit 649**

32 Esther M. Hanson has caused the below described tract to be platted as  
33 Woodland Place. Said tract is described as follows. Beginning of the point  
34 where the North side of Section 13- T153N-R65W intersects the meander  
line on the west side of Creel Bay. Thence North 52°-50'-19" West 460 feet,  
thence South 37°-09'-11" West 704.3 feet, thence South 55°-50'-19" West

1 1182.3 feet, thence South 25°-33'-14" West 1448.6 feet, thence South 64°-  
2 26'-46" East 460 feet to the meander corner, thence North 25°-33'-14" East  
3 along the meander line 1324.1 feet, thence North 55°-50'-19" East along the  
4 meander line 1133.5 feet, thence North 37°-09'-11" East along the meander  
5 line 780 feet to the point of beginning. Said tract contains 34.6 acres (32.7  
6 acres in sec. 13, 1.9 acres in sec. 12). All streets shown on this plat are  
dedicated to public use forever.

7 260. Jason Bednarz and Brenda Bednarz's property, a residential lot, is completely flooded  
8 and/or damaged by the Devils Lake floodwaters. Almost all of it is flooded. The rest is too  
9 small for any use. This property initially started to flood in June of 1994. The flooding  
10 gradually increasing until the entire property was completely flooded or damaged in the  
11 summer of 1997. So, the low elevation range of the property was 1429.86 feet to 1430.51  
12 feet. The high elevation was not greater than 1442.97 feet based on the flooding history. It  
13 is not consistent with his cross examination testimony where he states the property elevation  
14 may be between 1428 feet and 1436 feet. I find the flooding history is a more accurate way  
15 of determining the elevation absent a survey record. Additional damages to this property  
16 include the cost of moving a mobile home, and lost improvements of rural sewer, rural  
17 water and a shed.

18 261. Plaintiff, **Allan Thompson** resides at 300 14<sup>th</sup> Avenue SE, Devils Lake, ND 58301.

19 262. Plaintiff, Allan Thompson owns property in Ramsey County near or adjacent to Devils Lake  
20 as Lots 21 and 22 of Eagle Bend Estates, legally described as:

21 **Plaintiffs' Exhibit 939**

22 Lots Twenty-one (21) and Twenty-two (22) of EAGLE BEND ESTATES,  
23 Subdivision 1, Ramsey County, North Dakota, according to the Plat thereof  
24 filed of record in the office of the Register of Deeds of Ramsey County, North  
Dakota, and recorded in Plat Cabinet 1, Slide 189 in said office.

25 **Plaintiffs' Exhibit 940**

26 Beginning at the intersection of the East West 1/4 line in Section 7 Township  
27 153 North Range 64 West with the meander line of Devils Lake, thence N 15°-  
28 18" E along the Meander line 896.6 feet, thence N 1□-34' E along the meander  
29 line 791.3 feet, thence N 36□-29' W along the meander line 527.3 feet, thence  
30 N 0□-28' W along the meander line 231.0 feet, thence N 34□-02' E along the  
31 meander line 451.5 feet, thence N 23□-22' E along the meander line 305.5 feet,  
32 thence S 66□-38' E 260 feet, thence S 23□-22' W 305.5' feet, thence  
33 Southwesterly along a 22.037□ curve a distance of 48.4 feet, thence S 34□-02'  
34 W 261.8 feet, thence Southeasterly along a 27.245□ curve a distance of 258.8  
feet, thence S 36□-29' E 332.3 feet, thence Southeasterly along a 22.037□  
curve a distance of 172.7 feet, thence S 1□-34' W 791.3 feet, thence  
southwesterly along a 22.037□ curve a distance of 62.3 feet, thence S 15□-18'

W 817.7 feet to the 1/4 line, thence S 88°-24' W a distance of 271.7 feet to the point of beginning. Said tract contains 14 acres more or less. All streets shown on the attached plat are hereby dedicated to the public use forever.

263. Allan Thompson's property, two residential lots, is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1995, and became completely flooded in 1998 or 1999. So, its low elevation range was 1435.27 feet to 1435.74 feet. Its high elevation was not greater than 1447.7 feet. Additional damages include loss of water system, sewer line, 52 evergreen trees he had planted, a mobile home which was moved and the porch attached to it that was torn down.
264. Allan Thompson testified on behalf of plaintiff **TBH Farms** (Allan Thompson, Yvonne Thompson, Richard LeFleur, Shirley LeFleur and Boyd LeFleur, and Susan LeFleur) He established his knowledge of TBH farms.
265. Plaintiff, TBH Farms owns property near or adjacent to Devils Lake in Ramsey County, North Dakota and which is legally described as:

**Plaintiffs' Exhibit 342**

PARCEL 1: Commencing at a mound 66 feet West of the Southeast corner of Lot 8 of Section 5 (Lot 8 being in the NE1/4SE1/4 of Section 5). Thence due North from said mound into the old lake bed so far as the riparian rights go, at all times 66 feet West of and parallel to the Section line between Sections 4 and 5, thence West of said North and South described line to include and convey all the remaining part of said Lot 8; also all of the Lot 9 of Section 5 (Lot 9 being in the SW1/4SE1/4 of Section 5); also all of Lot 10 in Section 5 (Lot 10 being in the SE1/4SW1/4 and in the SW1/4SW1/4 of Section 5); also all of Lot 10 in Section 6 (Lot 10 also being in the SE1/4SE1/4 of Section 6); also Lot 3 in Section 7 (Lot 3 being in the NE1/4NE1/4 of Section 7); also all of Lot 4 in Section 7 (Lot 4 being in the SE1/4NE1/4 of Section 7); all the foregoing lots in Parcel 1 are to include all riparian rights thereunto belonging and all are located in Township 153 North, Range 64 West of the 5th Principal Meridian in the County of Ramsey in the State of North Dakota, EXCEPT any previous conveyances which have been made of this real estate.

PARCEL 2: The NW1/4 of Section 8 and the NW1/4NE1/4 of Section 8, Township 153 North, Range 64 West of the 5<sup>th</sup> Principal Meridian situated in the County of Ramsey in the State of North Dakota; EXCEPT a parcel of land of approximately 1-1/2 acres conveyed by deed under date of October 29, 1952; and EXCEPT a parcel of land of approximately 2 acres conveyed by deed under date of August 16, 1913, and EXCEPT approximately 3.15 acres for road; and EXCEPT a parcel of land of approximately .60 of an acre

conveyed by deed under date of September 8, 1899; and EXCEPT any previous conveyances which have been made of this real estate.

Parcels 1 and 2 contain approximately 373.38 acres M/L.

ADDENDUM TO THE ABOVE LEGAL DESCRIPTION: "The Erroneous Legal Description described in said Deed mentioned above and dated October 29, 1952, has been corrected by Quit Claim Deeds under dates of April 26, 1971, and May 11, 1971, and now of record in Ramsey County, North Dakota.

It is the intention of the parties that the above land does include Lots 3 through 12, Eagle Bend Estates Third Subdivision which plat was filed with the Ramsey County Register of Deeds on August 12, 1986 at 4:15 p.m., in Plat Cabinet 2, Slide 254, as Document 184678. Lots 1 and 2 of Block 1 of this subdivision are not included, however, for the reason these lots have been sold to third parties, and are reflected in the parcels which are hereinafter excepted.

LESS THE FOLLOWING ELEVEN PARCELS OF LAND:

PARCEL 1: The following parcel of land which has been conveyed to Contel of North Dakota, Inc. and is a tract of land situated in the SE1/4NW1/4 of Section 8, Township 153 North of Range 64 West in Ramsey County, North Dakota, and described as follows:

Commencing at the North 1/16th corner between said Section 8 and 9; thence N90 degrees 00'00"W along the 1/41/4 line, said line also being the center line of Ramsey County Highway #1, a distance of 2798.55 feet; thence continuing along said highway centerline on a simple curve concave to the southeast having a radius of 574.06 feet, an arc distance of 208.73 feet; thence S 20 degrees 50'00" E a distance of 75 feet to a point on the southerly right-of-way of said highway, said point being the point of beginning of the tract of land herein described; thence continuing South 20 degrees 50'00" E a distance of 60.00 feet; thence N71 degrees 28'28" E a distance of 40.00 feet; thence N20 degrees 50'00" W a distance of 60.00 feet to a point on said right-of-way; thence along said right-of-way an arc distance of 40.03 feet to the point of beginning. Said tract of land contains 0.06 acres, more or less.

PARCEL 2: The land which has been platted in the following subdivisions:

1. Eagle Bend Estates, which plat was filed with the Ramsey County Register of Deeds on February 3, 1975 at 11:00 o'clock a.m. in Plat Book #5, Page 138, as Document 159240.
2. Eagle Bend Estates Subdivision Number 2, which plat was filed with the Ramsey County Register of Deeds on June 24, 1976 at 3:15 p.m. in Plat Cabinet Number 1, Slide 199, as Document Number 161988.

1 PARCEL 3: A tract of land which has been conveyed to Dale A. Dalziel and  
2 Yvonne K. Dalziel, and is described as follows:

3 A tract of land in Government Lot 4, Section 7, Township 153 N, Range 64  
4 W beginning at a point 62.20 feet east of the SE corner of Lot 1, Eagle Bend  
5 Estates, Subdivision 1, along the quarter line; thence northeasterly 150  
6 degrees 18' for 207.35 feet; thence easterly 75 feet parallel to the quarter line;  
7 thence southerly 200 feet to the quarter line; thence westerly 129.71 feet  
8 along the quarter line to the point of beginning containing 20,471 square feet,  
9 more or less. Said property is also described as Lot 1, Block 1, Eagle Bend  
10 Estates Third Subdivision which plat was filed as indicated herein.

11 PARCEL 4: A tract of land which has been conveyed to Bryan Hannesson,  
12 and is described as follows:

13 A tract of land situated in Lot 4, Section 7, Township 153 N, Range 64 W  
14 being more particularly described as follows: Commencing at a point on the  
15 East line of said Section 7, said point being located 30' south of the NE  
16 corner of said Lot 4; thence S 89 degrees 44'29" W parallel with the  
17 Northline of said Lot 4 a distance of 843.48' to the point of beginning of the  
18 tract of land herein described; thence continuing S 89 degrees 44'29" W a  
19 distance of 200' to the East line of Eagle Bend Estates Subdivision; thence  
20 South 1 degree 48'35" W along said subdivision a distance of 100'; thence N  
21 89 degrees 44'29" E a distance of 200'; thence N 1 degree 48'35" E a distance  
22 of 100' to the point of beginning. Said tract of land contains 20,000 S.F. more  
23 or less.

24 PARCEL 5: A tract of land which is owned by L.A. Braunagel, and  
25 described as follows:

26 The north 500' of the south 575' of the west 250' of the east 530' of the  
27 NE1/4NW1/4 of Section 8, Township 153, Range 64 together with the north  
28 100' of the west 250' of the east 280' of the SE1/4NW1/4 of said Section 8.  
29 Excepting all those portions of the above described tracts previously acquired  
30 for public highway right-of-way. Said tract contains 3.0 acres more or less.

31 PARCEL 6: A tract of land which is owned by L.A. Braunagel, and  
32 described as follows:

33 A tract of land situated in the NW1/4NE1/4 of Section 8 Township 153,  
34 Range 64, being more particularly described as follows: The north 500' of the  
south 575' of the west 250' of the east 1250' of said NW1/4NE1/4; the south  
boundary of said tract being the north R/W of County Road #1. Said tract  
contains 2.9 acres more or less.

1 PARCEL 7: Lot 31 of Eagle Bend Estates #2, according to the plat filed with  
2 the Ramsey County Register of Deeds which is owned by L.A. Braunagel.

3  
4 PARCEL 8: A tract of land which is owned by Allen E. Thompson and  
5 Evonne C. Thompson, and is described as follows:

6 A tract of land situated in the NW1/4NE1/4 of Section 8, Township 153,  
7 Range 64 being more particularly described as follows: The north 500' of the  
8 south 575' of the east 500' of the said NW1/4NE1/4; the south boundary of  
9 said tract being the north R/W of County Road #1. Said tract contains 5.7  
10 acres more or less.

11 PARCEL 9: A tract of land which is owned by L.A. Braunagel and is  
12 described as follows:

13 A tract of land situated in the NW1/4NE1/4 Section 8, Township 153, Range  
14 64 being more particularly described as follows: The north 500' of the south  
15 575' of the west 250' of the east 750' of said NW1/4NE1/4; the south  
16 boundary of said tract being the north R/W of County Road #1. Said tract  
contains 2.9 acres more or less.

17 PARCEL 10: A tract of land which has been conveyed to Lawrence J. Heit,  
18 Jr., and is described as follows:

19 A tract of land situated in the NW1/4NE1/4 of Section 8, Township 153,  
20 Range 64 being more particularly described as follows: The north 500' of the  
21 south 575' of the west 250' of the east 1000' of said NW1/4NE1/4; the south  
22 boundary of said tract being the north R/W of County Road #1. Said tract  
contains 2.9 acres more or less.

23 PARCEL 11: A tract of land which has been conveyed to Mark D. Flaig and  
24 Alisa A. Flaig, and is described as follows:

25  
26 Lot Two (2) Eagle Bend Estates Third (3rd) Subdivision.

- 27 266. This court finds that the property described above was contributed to a partnership known as  
28 TBH Farms when it was initially established on January 1, 1992. The original partners were  
29 Allen E. Thompson, Yvonne C. Thompson, Richard c. LaFleur, and Shirley E. LeFleur.  
30 Each were given a 25% interest in the partnership. At the time the partnership was created  
31 the parties contributed the real estate described in an attached Exhibit A to the partnership as  
32 partnership property which is all set forth in the previous finding.
- 33 267. On September 21, 1993 the articles of partnership for TBH Farms were modified. By the  
34 terms of that addendum which is Plaintiffs' Exhibit 343, Boyd Y. LaFleur and Susan

1 LaFleur were added as partners. By the terms of that addendum Allen E. Thompson owned  
2 an undivided one-fourth interest, Yvonne C. Thompson owned an undivided one-fourth  
3 interest, Richard C. LaFleur owned an undivided one-eighth interest, Shirley A. LaFleur  
4 owned an undivided one-eighth interest, Boyd Y. LaFleur owned an undivided one-eighth  
5 interest, and Susan LaFleur owned an undivided one-eighth interest.

6 Although the plaintiff in its proposed findings of facts and conclusions of law (proposed  
7 finding number 457) added an additional parcel of property through the addendum to the  
8 articles of partnership, Plaintiffs' Exhibit 343, no evidence was offered to support this  
9 assertion either through testimony or through the Exhibit 343.

10 268. The plaintiffs amended complaint dated December 9, 1999, at paragraph 245 asserts that  
11 TBH Farms (Allen E. and Yvonne C. Thompson, Richard C. and Shirley A. LaFleur, and  
12 Boyd Y. LaFleur) are the fee owners of certain real property located in Creel Township,  
13 Ramsey County. That property in that paragraph of the amended complaint is described as  
14 follows:

15 Lot 10 (less acres deeded), Section 5, Township 153 North, Range 64 West,  
16 Ramsey County North Dakota, and

17 Lots 3 and 4 (less acres deeded), Section 7, Township 153 North, Range 64  
18 West, Ramsey County North Dakota, and

19 Lot 1 (less acres deeded), and the South half of the Northwest quarter (South  
20 half N.W. quarter), the Northeast quarter of the Northwest quarter (N.E. quarter  
21 N.W. quarter), and the Northwest quarter of the Northeast quarter (N.W. quarter  
22 N.E. quarter) (less acres deeded), Section 8, Township 153 North, Range 64  
23 West, Ramsey County North Dakota, and

24 Lots 6, 7, 8, 9, 10, 11 and 12, Eagle Bend Estates Third Addition; Lot 3, Block 1,  
25 Eagle Bend Estates Fourth Addition; Lots 1, 3, 5 and 7, Eagle Bend Fifth  
26 Addition; Lots 4 and 5, Eagle Bend Sixth Addition, all in Ramsey County North  
27 Dakota.

28 The plaintiffs through their legal counsel during the examination of Allen Thompson  
29 stipulated that the property described in Plaintiffs' Exhibit 342 was only intended to offer  
30 proof of ownership. It was not offered with the intent to expand the property claims of these  
31 plaintiffs beyond what was alleged in the amended complaint at Paragraph 245.

32 269. Sufficient evidence has been presented to find that TBH Farms is the owner of all the property  
33 it is seeking damage for as set out in Paragraph 245 of the Amended Complaint with the  
34 possible exception of the N.W. 1/4 N.W. 1/4 of Section 8. In comparing the property claims  
set out in the amended complaint at Paragraph 245 to the property described in Exhibit 342,  
the legal descriptions establish that the property in the amended complaint is also in  
Plaintiffs' Exhibit 342. They each contain all of Lot 10 Section 5-153-64; all of Lots 3 and 4

1 Section 7-153-64; the Northwest quarter Section 8-153-64 (but only if Lot 1 in Section 8 of  
2 the Northwest quarter is in fact also the Northwest quarter of the Northwest quarter); and the  
3 Northwest quarter of the Northeast quarter Section 8-153-64 (except for property previously  
4 deeded); and Lots 3-12 Eagle Bend Subdivision Third Addition in Ramsey County North  
5 Dakota.

6 The plaintiffs claim that the property described in the amended complaint at paragraph 245  
7 includes several parcels of property in the Third, Fourth, Fifth and Sixth subdivision of the  
8 Eagle Bend subdivision in Ramsey County North Dakota. Plaintiffs' Exhibit 342 sufficiently  
9 establishes the ownership as to Lots 3-12 Eagle Bend Estates Third Subdivision in Ramsey  
10 County either to the partnership or the individual partners. Plaintiffs' Exhibit 350, the plat of  
11 the Eagles Bend Estate Third Subdivision clearly establishes that Lots 3 through 12 are part  
12 of the partnership property. The surveyor certificate indicates that this subdivision is located  
13 in Lots 4 of Section 7 and part of the Southwest quarter Northwest quarter Section 8. So,  
14 these lots are both in Plaintiffs' Exhibit 342 as well as the amended complaint.

15 Plaintiffs' Exhibit 351 is a plat of the Eagles Bend Estates Fourth Subdivision. The plaintiff  
16 claims that it owns lots 3 of block 1 in that subdivision. The plat of the Fourth Subdivision  
17 certifies that this property is located in Lot 4 Section 7. So, this property is also claimed to be  
18 a part of the plaintiff's property as alleged in Paragraph 245 of the amended complaint and is  
19 part of the legal description set out in Plaintiffs' Exhibit 342.

20 Plaintiffs' Exhibit 352 is a plat of the Eagles Bend Estates Fifth Subdivision in Ramsey  
21 County North Dakota. In their amended complaint at Paragraph 245 the plaintiffs allege that  
22 the partnership owns lots 1, 3, 5 and 7 in the Fifth Subdivision. The plat certifies that this  
23 property is located in the Northeast quarter of Section 7. So, this property is alleged to be  
24 owned by the partnership in Paragraph 245 of the amended complaint and is also included in  
25 the legal description in Plaintiffs' Exhibit 342. (See Plaintiffs' Exhibit 551 - a plat map of  
26 Creel Bay Township).

27 The Plaintiffs' Exhibit 353 is a plat of the Eagles Bend Estates Sixth Subdivision in Ramsey  
28 County North Dakota. In their amended complaint the plaintiffs allege at Paragraph 245 that  
29 the partnership owns Lots 4 and 5 of the Eagles Bend Estates Sixth Subdivision. The plat  
30 certifies that this property is located in the Northeast quarter section of Section 7. Lot 4 is in  
31 the Northeast quarter of Section 7 and is adjacent to Devils Lake on Creel Bay. (See  
32 Plaintiffs' Exhibit 551). So, this property is both set forth in the amended complaint and is  
33 included as part of the legal description in Plaintiffs' Exhibit 342.  
34

1 Based upon this analysis set forth above, this court is satisfied that the property interests  
2 contributed to the partnership in the articles of partnership described as Plaintiffs' Exhibit  
3 342 include all of the property (and additional property) that is alleged to have been taken or  
4 damaged as described in Paragraph 245 of the amended complaint.

5 270. The plaintiffs offered additional exhibits to show the different ownership interests of the  
6 parties described in parcel's one and two of Plaintiffs' Exhibit 342. These exhibits are  
7 described and determined by this court to do the following:

- 8 a. Plaintiffs' Exhibit 941 is a warranty deed dated February 10, 1992 in which  
9 Lawrence J. Heit, Jr. and Sylvia Heit transfer an undivided one-sixth interest  
10 in Parcel 1 and 2 described in Plaintiffs' Exhibit 342 to Allen E. Thompson  
11 and Yvonne C. Thompson.
  - 12 b. Plaintiffs' Exhibit 347 is a warranty deed in which L.A. Braunagel conveys  
13 a one-third interest in Parcels 1 and 2 described in Plaintiffs' Exhibit 342 on  
14 June 10, 1992 to Allen E. Thompson and Yvonne C. Thompson.
  - 15 c. Plaintiffs' Exhibit 348 is a warranty deed in which Kay Heit conveys a one-  
16 sixth interest of the property described in Parcels 1 and 2 in Plaintiffs'  
17 Exhibit 342 on August 4, 1992 to Allen E. Thompson and Yvonne C.  
18 Thompson. (It also in addition to accepting eleven lots excepts a twelfth lot  
19 from that).
  - 20 d. Plaintiffs' Exhibit 349 is a warranty deed that conveys on June 29, 1992  
21 from the Estate of Lawrence Heit a one-sixth interest to the property in  
22 parcels 1 and 2 described in Plaintiffs' Exhibit 342 to Allen E. Thompson  
23 and Yvonne C. Thompson.
  - 24 e. Plaintiffs' Exhibit 346 is a warranty deed which is dated June 12, 1992 and  
25 conveys from Allen E. Thompson to Yvonne C. Thompson a one-half  
26 interest of the property described in parcels 1 and 2 of Plaintiffs' Exhibit  
27 342 to Richard C. LaFleur and Shirley A. LaFleur.
  - 28 f. Plaintiffs' Exhibit 357 is a warranty deed dated December 15, 1992 in which  
29 Richard C. LaFleur and Shirley A. LaFleur convey 50% of their interest in  
30 the property described in parcels 1 and 2 of Plaintiffs' Exhibit 342 to Boyd  
31 L. LaFleur.
  - 32 g. Plaintiffs' Exhibit 356 is a correction deed dated September 21, 1993 which  
33 relates to the property described in Plaintiffs' Exhibit 357.
- 34

- 1 h. Plaintiffs' Exhibit 355 is a Quit Claim deed dated September 21, 1993 in  
2 which Boyd Y. LaFleur and Susan LaFleur convey their interests in the  
3 property in parcels 1 and 2 of Plaintiffs' Exhibit 342 to themselves, Boyd Y.  
4 LaFleur and Susan LaFleur.
- 5 i. Plaintiffs' Exhibit 345 is a Quit Claim deed by Richard C. LaFleur and  
6 Shirley LaFleur as individuals to the Richard C. LaFleur living trust and the  
7 Shirley LaFleur living trust. It is dated June 15, 1999 and conveys all of  
8 their undivided one-half interest in parcels 1 and 2 of the property described  
9 in Plaintiffs' Exhibit 342.
- 10 j. Plaintiffs' Exhibit 344 is a Quit Claim deed by Richard C. LaFleur and  
11 Shirley LaFleur which is dated June 30, 1999 and conveys a one-quarter  
12 interest they possess in parcel's 1 and 2 of the property described in  
13 Plaintiffs' Exhibit 342 to the Richard C. LaFleur living trust and the Shirley  
14 LaFleur living trust.
- 15 k. Plaintiffs' Exhibit 354 is a Quit Claim deed dated June 15, 1999 in which  
16 Boyd Y. LaFleur and Susan K. LaFleur convey all of their one-quarter  
17 interest in parcel's 1 and 2 of the property described in Plaintiffs' Exhibit  
18 342 to the Susan K. LaFleur living trust and the Boyd Y. LaFleur living  
19 trust.

20 271. The defendants argue that the claims of TBH Farms should be dismissed on the basis that  
21 they have failed to establish that TBH Farms, a partnership, is the owner of the subject  
22 properties. (See Post Trial Opening Brief of Defendant's Benson, Cavalier, Pierce, Rolette,  
23 and Towner Water Resource Districts at p.71-73). Plaintiffs' Exhibit 342 were the Articles  
24 of Partnership for TBH Farms and Plaintiffs' Exhibit 343 was an addendum to that.  
25 Plaintiffs' Exhibit 342 included an Exhibit A which described all of the property owned by  
26 these different individuals named in paragraph 245 of the amended complaint, which they  
27 contributed to TBH Farms partnership as partnership property. This court is satisfied that  
28 under N.D.C.C. 45-14-04 that this contribution and the intent contained in the articles of  
29 partnership were sufficient to establish at least an equitable ownership by the partnership in  
30 the subject property. Further, the amended complaint also lists the five individual partners,  
31 Allen E. Thompson, Yvonne C. Thompson, Richard C. LaFleur, Shirley A. LaFleur, and  
32 Boyd Y. LaFleur as plaintiffs. Considering that under Rule 8 N.D.R.Civ.P. that pleadings are  
33 to be liberally construed and simply to provide notice of the claim for relief, see Jablonsky v.  
34

1 Klemm 377 N.W. 2d 560 (N.D. 1985), adequate notice of the named parties potentially  
2 pursuing this claim was set out. Further, at Rule 17(a) N.D.R.Civ.P. it is provided that:

3 (a) *Real party in interest. Every action must be prosecuted in the name of the*  
4 *real party in interest. An executor, administrator, guardian, bailee, trustee*  
5 *of an expressed trust, a party with whom or in whose name a contract has*  
6 *been made for the benefit of another, or a party authorized by statute may*  
7 *sue in that person's own name without joining the party for whose benefit*  
8 *the action is brought; . . .*

9 With the individual parties having decided to bring this claim asserting it as partnership  
10 property, they have a sufficient factual basis to do so based on the previous findings. From  
11 the evidence in the trial record the partnership and its partners are the real parties in interest.  
12 With the plaintiffs having claimed this is partnership property and the equitable interest at the  
13 least that the partnership has in the subject property, all of the six individual partners would  
14 be estopped from claiming that this was their individual property. So, this court cannot see  
15 how the defendants can claim any potential harm from any inconsistencies in the deeds  
16 offered into evidence when the six individuals acknowledge it is property of the TBH Farms.

17 272. TBH Farms' property at Lot 10, Section 5 is 45.00 acres. It is all flooded and/or otherwise  
18 damaged by the Devils Lake floodwaters. This property initially started to flood in April or  
19 May of 1997, when it was completely flooded. So, it had an elevation range of about 1438  
20 feet to 1442.03 feet. Additional damages to this property include loss of water and sewer  
21 lines, and a paved road.

22 273. TBH Farms' property at Lot 3 of Section 7 is 41.00 acres. It is all flooded and/or otherwise  
23 damaged by the Devils Lake floodwaters. This property initially started to flood in April,  
24 May or June of 1997 when it was completely flooded. So, it had an elevation range of  
25 above 1438 feet to 1442.32 feet.

26 274. TBH Farms' property at Lot 4 of Section 7 is 41.00 acres. It is all flooded and/or otherwise  
27 damaged by the Devils Lake floodwaters. This property initially started to flood in April,  
28 May or June of 1997, when it was completely flooded. So, it has an elevation range of  
29 about 1438 feet to 1442.32 feet.

30 275. TBH Farms' property at Lot 1, Section 8; the South half of the Northwest Quarter of Section  
31 8; the Northeast Quarter of the Northwest Quarter of Section 8; and the Northwest Quarter  
32 of the Northeast Quarter of Section 8 have not been flooded by the waters of Devils Lake.  
33 The only damage suggested by plaintiff is that "they put a drain through it and the Corp of  
34 Engineers took it from us." Plaintiff then states he has lot one left. Based on this, the  
plaintiff, TBH Farms has failed to establish sufficient proof of any damages to their property  
in Section 8. Rather, plaintiffs claim this land is somehow damaged because a dike has been

constructed which places them on the dry side of it but in turn denies them access to the lake. This part of their claim is to be dismissed on this basis and it shall be so ordered.

276. TBH Farms' property at (Eagle Bend Estates' Third Subdivision) Lots 6, 7, 8, 9, 10, 11 and 12 is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in April or May of 1997, when they became completely flooded. So, its elevation range was 1438 feet to 1442.03 feet. Additional damages to this property include loss of sewer and water lines and paved streets.

277. TBH Farms' property at (Eagle Bend Estates' Fourth Subdivision) Lot 3 of Block 1 is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in April or May of 1997, when it became completely flooded. So, it had an elevation range of 1438 feet to 1442.03 feet. Additional damages include loss of sewer and water lines, and paved streets.

278. TBH Farms' property at (Eagle Bend Estates' Fifth Subdivision) Lots 1, 3, 5 and 7 is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in April or May of 1997, when they became completely flooded. So, the lots had an elevation range of 1438 feet to 1442.03 feet. Additional damages to this property include loss of sewer and water lines, and paved streets.

279. Plaintiff, TBH Farms' property at (Eagle Bend Estates' Sixth Subdivision) Lots 4 and 5 is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood after April or May of 1997, when they became completely flooded. So, it had an elevation range of 1438 feet to 1442.03 feet. Additional damages to this property include loss of sewer and water lines, and paved streets.

280. Plaintiff, **Gregory Maddock** resides at 5211 - 30<sup>th</sup> Street NE, Maddock, ND 58348.

281. Gregory Maddock owns property near or adjacent to Devils Lake, in Benson County, State of North Dakota, legally described as:

**Plaintiffs' Exhibit 749**

PART OF NE1/4SW1/4 (OF RW 5A) SECTION 10; SW1/4NE1/4 LOTS 2, 3 & 4 (RW 25.17A) SECTION 10; LOTS 7 & 8 PART OF 6 (LESS 10A) SECTION 10; SE1/4 & SW1/4 AND 17.04 A IN S1/2NW1/4 38 A OF S1/2NE1/4 & LOT A OF S1/2NE1/4 ALL IN SECTION 11; SW1/4 & SE1/4 & S1/2S1/2NW1/4 LOT A OF S1/2NW1/4 (CONT. 27.75A) ALL IN SECTION 12; SE1/4 & NE1/4 & LOTS 1, 2 & 3 LESS P#9 4.69A AND LOTS 4, 5, 9 & 10 AND NW1/4NW1/4 LOTS 6, 7, & 8 ALL IN SECTION 13; NE1/4 & NW1/4SW1/4 & SW1/4SW1/4 LESS PAR. #3 1.81A AND LOTS 1, 2, 3 & 4 LESS P.#4 1.50A LOT 3 & P.# 5 1.55A AND N1/2NW1/4, LOTS 5 6 7, & 8 AND N1/2SE1/4 LOTS 9 & 10 ALL IN SECTION 14; S1/2 LOT 3 (LESS 3.88A OF NW COR.) LOT A OF GOVT. LOT 2, LOT A OF

1 GOV. LOT 3 - BEGIN AT INTERS. OF RES.-LINE & S. LINE SEC. 15),  
2 LOT A OF GOV. LOT 1 (LESS 15 A & 1.84A RW) ALL IN SECTION 15;

3 LOT 4 AND LOT 1 LESS PAR. #8 4.16A ALL IN SECTION 23; LOT 1  
4 LESS PAR. # 10...7.14A, LOT 8 LESS-PAR #11 1.36A, LOT 13 ALL IN  
5 SECTION 24: ALL THE ABOVE FOREGOING LANDS ARE IN  
6 TOWNSHIP ONE HUNDRED FIFTY THREE (153) AND RANGE SIXTY  
7 SEVEN (67).

8 THE NW1/4 AND THE SW1/4 LESS 7A and LESS 2.20A Co. RD. RW; all  
9 of which land is in SECTION 23 of TOWNSHIP ONE HUNDRED FIFTY  
10 TWO (152) and RANGE SIXTY NINE (69).

11 NW1/4 (RW 6.07A) LESS 2.51A CO. RD. RW in SECTION 26 and  
12 TOWNSHIP ONE HUNDRED FIFTY TWO (152) and RANGE SIXTY  
13 NINE (69).

14 NW1/4 and Lot 2 Less PAR. #12 rw 2.13A in Section 18 and THE  
15 S1/2SW1/4 AND THE S1/2N1/2SW1/4 of Section SEVEN (7) TOWNSHIP  
16 ONE HUNDRED FIFTY THREE (153) and RANGE SIXTY SIX (66).  
17 W1/2SW1/4 and LOT 4 LESS P.# 12 RW 2.13 A in Section 18 TOWNSHIP  
18 ONE HUNDRED FIFTY THREE (153) and RANGE SIXTY SIX (66).

19 All of this property this plaintiff claims has been taken or damaged by defendants and as  
20 identified and described in the amended complaint dated December 9, 1999 at Paragraph  
21 167 is included in the legal descriptions in Plaintiffs' Exhibit 749.

22 These parcels of property owned by the defendant are located in either West Bay Township  
23 in Benson County or the Second Commissioner District in Benson County. The plat of the  
24 West Bay Township is in evidence as Plaintiffs' Exhibit 565. The plat of the Second  
25 Commissioner District is in evidence as Plaintiffs' Exhibit 566. The plaintiff's property set  
26 out in Paragraph 167 of the amended complaint has been yellow highlighted in these two  
27 exhibits to identify the property and its location.

28 282. Gregory Maddock's property at the Southwest Quarter of the Northeast Quarter and Lots 2,  
29 3, 4, 7 and 8 all of Section 10, Township 153 North, Range 67 is completely flooded and/or  
30 otherwise damaged by the Devils Lake floodwaters. This property initially started to flood  
31 in April or May of 1994, with the flooding gradually increasing until all the property was  
32 completely flooded or damaged by the end of 1996. So, the low elevation range of the  
33 property was about 1428.34 feet to 1429.93 feet. The high elevation of the property was not  
34 greater than 1437.81 feet. Additional damages to this property include loss of fences.

- 1 283. Gregory Maddock's property at the South half of the South half of the North half of Section  
2 11, Township 153, Range 67 is completely flooded and/or otherwise damaged by the Devils  
3 Lake floodwaters. This property initially started to flood in April or May of 1994, with  
4 flooding gradually increasing until the entire property was all flooded or damaged by the end  
5 of 1996. So, its low elevation range was about 1428.34 feet to slightly less than 1429.93  
6 feet. Its high elevation was not greater than 1437.81 feet. Additional damages to this  
7 property include loss of fences.
- 8 284. Gregory Maddock's property at the South half and the South half of the South half of the  
9 Northwest Quarter of Section 12 is completely flooded and/or otherwise damaged by the  
10 Devils Lake floodwaters. This property initially started to flood in April or May of 1994,  
11 with flooding gradually increasing until all the property was completely flooded or damaged  
12 by the end of 1996. So, the low elevation range of the property was about 1428.34 feet to  
13 1429.93 feet. The high elevation was not greater than 1437.81 feet. Additional damages  
14 include loss of fences and water holes for the cattle.
- 15 285. Plaintiff, Gregory Maddock's property at part of the West half of the Southeast Quarter of  
16 Section 15 is completely flooded and/or otherwise damaged by the Devils Lake floodwaters  
17 except for about 25 acres. This property initially started to flood in April or May of 1994,  
18 and progressively worsened in 1995, with flooding gradually increasing until all but  
19 approximately 25 acres was completely flooded in April or May of 1996. So it has a low  
20 elevation range of about 1428.34 feet to 1429.93 feet. Its high elevation was not greater  
21 than 1437.81 feet.
- 22 286. Gregory Maddock's property at Section 14, Township 153, Range 67, contains 595 acres. It  
23 is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
24 property initially started to flood in April or May of 1994, with flooding gradually  
25 increasing until all the property was completely flooded or damaged by the end of 1996. So,  
26 the low elevation range of the property was about 1428.34 feet to 1429.93 feet. The high  
27 elevation of the property was not greater than 1437.81 feet. Additional damages to this  
28 property include loss of a large corral, fences, one well, and one water hole.
- 29 287. Plaintiff, Gregory Maddock's property at Section 13 is all flooded and/or otherwise  
30 damaged by the Devils Lake floodwaters. This property initially started to flood in April or  
31 May of 1994, with flooding gradually increasing until all the property was completely  
32 flooded or damaged by the end of 1996. So, the low elevation of this property was about  
33 1428.34 feet to 1429 feet. Its high elevation was not grater than 1437.81 feet. Additional  
34 damages to this property include loss of fences, a well, and a couple of dugouts.

1 288. Gregory Maddock's property at the Northeast Quarter of the Northeast Quarter of Section  
2 23, contains 40 acres. It is completely flooded and/or otherwise damaged by the Devils  
3 Lake floodwaters. This property initially started to flood in April or May of 1994, with  
4 flooding gradually increasing until all the property was completely flooded or damaged by  
5 the end of 1996. So, it had a low elevation range of about 1428 feet to 1429.93 feet. Its  
6 high elevation did not exceed 1437.81 feet. Additional damages at the Northeast Quarter of  
7 the Northeast Quarter of Section 23 include loss of fences.

8 289. Gregory Maddock's property at the North half of the Northwest Quarter of Section 24 is  
9 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
10 property initially started to flood in April or May of 1994, with flooding gradually  
11 increasing until all the property was completely flooded or damaged by the end of 1996. so,  
12 it had a low elevation range of about 1438.34 feet to 1429.93 feet. It had a high elevation  
13 not exceeding 1437.81 feet. Additional damages to this property include loss of fences and  
14 a dugout.

15 290. Gregory Maddock's property at the West half of Section 18 is completely flooded and/or  
16 otherwise damaged by the Devils Lake floodwaters. This property initially started to flood  
17 in April or May of 1994, with flooding gradually increasing until all the property was  
18 completely flooded or damaged by the end of 1996. so, it had a low elevation range of  
19 about 1438.34 feet to 1429.93 feet. The high elevation of the property was not greater than  
20 1437.81 feet.

21 291. Plaintiff, Gregory Maddock's property at the Southwest Quarter of Section 7 is completely  
22 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
23 started to flood in April or May of 1994, with flooding gradually increasing until all the  
24 property was completely flooded or damaged by the end of 1996. So, it had a low elevation  
25 range of about 1428.34 feet to 1429.93 feet. The high elevation of the property was not  
26 greater than 1437.81 feet. Additional damages to this property include loss of fences.

27 292. Plaintiffs, **Lyle and Mavis Huffman** reside at 1354 - 42<sup>nd</sup> Street, NE, Devils Lake, ND  
28 58301. Plaintiffs, Lyle and Mavis Huffman own property near or adjacent to Devils Lake,  
29 legally described as:

30 **Plaintiffs' Exhibit 737**

31 The West Half of the Southeast Quarter (W1/2SE1/4), the North Half of the  
32 Southwest Quarter (N1/2SW1/4), the South Half of the Northwest Quarter  
33 (S1/2NW1/4), the South Half of the Northeast Quarter (S1/2NE1/4), and  
34 Lots One (1), Two (2), Three (3) and Four (4) of Section Two (2); and the  
East Half of the Southeast Quarter (E1/2SE1/4) of Section Three (3), less  
railroad right-of-way and highway right-of-way previously deeded; all in

Township One Hundred Fifty-two (152), Range Sixty-seven (67), Benson  
County, North Dakota.

293. Lyle **and** Mavis Huffman's property at Lot 1 of Section 2 contains approximately 46 acres. All but 10 acres are flooded. These remaining acres become impacted when high winds push Devils Lake water onto the remaining acreage. Therefore, the entire lot is completely damaged. This property initially started to flood in April or May of 1995, with flooding gradually increasing with the increased lake levels of Devils Lake. So, the low elevation range of this property was about 1431.74 feet to 1435.26 feet. The high elevation range of the property actually flooded was not greater than 1449.2 feet.

294. The defendants assert that all of the property claims of Lyle and Mavis Huffman's property should be dismissed for two reasons. First, defendants claim that the evidence affirmatively shows that these plaintiffs failed to bring their action within the required statute of limitations. The property described in Plaintiffs' Exhibit Number 737 was part of this plaintiff's claim in the amended complaint dated December 9, 1999. Further, they are original plaintiffs in the action filed June 2, 1999 and commenced on or about that time. This action was filed and commenced on or about that date. Although this plaintiff testified that their property began to be "impacted" as early as 1975, there is no testimony as to what was meant by that description. However, the plaintiff did testify that his property had some water come on to it and then recede in 1994 but that in April or May of 1995 it began to flood and from that point did not recede. Consequently, it is this time period which would be the minimum in which some notice might have been placed on the plaintiffs as to the accrual of their cause of action. This is well within the six year timeframe required by the statute of limitations for this inverse condemnation action for the property described in Plaintiffs' Exhibit Number 737 and as set forth in the original and amended complaint. This determination is made even without considering what evidence has or has not been presented by the defendants to affirmatively show when this plaintiff might have been aware of a possible cause for this flooding. (Although the defendants also claim that an additional parcel of these plaintiffs set forth in the Third Amended Complaint should be dismissed on grounds of failing to meet the appropriate statute of limitations, it already has been. See Memoranda Decision and Order Granting Motions for Partial Summary Judgment Statute of Limitations, dated April 1, 2005 at p.20.)

295. The defendants also assert in their post trial briefs that the claims for all of the remaining property contained in Plaintiffs' Exhibit 737 should be dismissed for insufficient evidence being shown of any potential damages. (See Post Trial Brief of State at p.70 and Post Trial Brief of Ramsey County Water Resource District at p.24.) This court agrees. Lyle Huffman

1 testified that none of these remaining properties-specifically, Lots 2, 3 and 4 in Section 2;  
2 the West half of the Southeast quarter; the North half of the Southwest quarter; and the  
3 South half of the Northwest quarter; and the South half of the Northeast quarter of Section 2  
4 and the East half of the Southeast quarter of Section 3 had any water on it. (See Trial  
5 Transcript, Volume 11 at p.2880-7).

6 This plaintiff's basis for his claim for damages on this remaining property is that the  
7 floodwaters have somehow caused the water table to elevate, thereby making the soil of his  
8 property suffer higher salinity. As noted by Ramsey County Water Resource District's  
9 attorney in his post trial brief, there is no evidence in the trial record that has established a  
10 causal connection between the rise in Devils Lake and a rise in the adjoining water table or  
11 for that matter, a greater salinity in the plaintiff's property. Further, there is no evidence as  
12 to the salinity before the lake began to rise or currently, either through some form of  
13 quantitative or qualitative testing, or antidotal examples. Rather, it is merely a conclusory  
14 statement on the part of the plaintiff. Considering all of this, this court agrees that except  
15 for Lot 1 in Section 2-Township 152-Range 67 in Benson County, all of the other claims of  
16 this plaintiff are subject to dismissal and it shall be so ordered.

17 296. Plaintiff, **Rick A. Schwab** resides at 4320 - 90<sup>th</sup> Avenue NE, Devils Lake, ND 58301.

18 297. Plaintiff, Rick A. Schwab owns property near or adjacent to Devils Lake, in the County of  
19 Ramsey, State of North Dakota, legally described as:

20 **Plaintiffs' Exhibit 733**

21 N1/2NE1/4; SW1/4NE1/4; and Lots One (1), Two (2) and Three (3), all in  
22 Section 32, Township 154 North, Range 65 West including all riparian rights  
23 to adjoining lakeshore of Devils Lake, a navigable body of water.

24 Contained within the above described property is a development done by this plaintiff called  
25 Six Mile Heights. It is set out in Plaintiffs' Exhibit 734 and located in Section 32,  
26 Township 154 North, Range 65 West.

27 298. Rick A. Schwab's property, totals 242 acres. Out of this acreage, 25 acres are completely  
28 flooded. Much of the acres flooded is the Six Mile Heights development of which two  
29 thirds is flooded and the rest of the Six Mile Heights development damaged. This property  
30 initially started to flood in April of 1994, with the flooding gradually increasing to the high  
31 point in 2006. So the low elevation range of the property is about 1428.34 feet to 1429.26  
32 feet. The elevation of the property flooded is not greater than 1449.2 feet. The rest of the  
33 Six Mile Heights Development not flooded is also damaged do to the impact of the lake on  
34 its infrastructure. Additional damages to this flooded property include loss of water and  
sewer lines, and lost mobile home rental business.

1 299. This plaintiff claims that the remaining acreage not flooded and not part of the Six Mile  
2 Heights Development has also been damaged. The basis for this is that this plaintiff relies  
3 on his belief that the pattern of flooding if Devils Lake has reduced the value of the  
4 remaining acreage due to uncertainties created by the lake's changing elevation and because  
5 the elevation of the remaining acreage is 1454 to 1455 feet.

6 This court finds that this basis held by plaintiff is conclusory and wholly speculative. It is  
7 insufficient to constitute a factual basis to find that this property has been taken or damaged  
8 regardless of the lake's past history. Therefore, this part of this plaintiff's claim is to be  
9 dismissed and it shall be so ordered.

10 300. Plaintiff, **Ruddy Binfet** resides at 2213 - 10<sup>th</sup> Avenue SW, Devils Lake, ND 58301.

11 301. Ruddy Binfet owns property near or adjacent to Devils Lake in the County of Ramsey, State  
12 of North Dakota, legally described as:

13 **Plaintiffs' Exhibit 654 and 655**

14 Beginning at a point where the easterly right-of-way line of the Great Northern  
15 Railroad intersects the north line of sec. 21, Twp. 153, Rge. 64: thence east along the  
16 north line of said Sec. 21 until said line intersects the meander line of Devils Lake;  
17 thence southwesterly along the meander line of Devils Lake until said meander line  
18 intersects the north line of the Military Reserve generally known as Camp Grafton;  
19 thence west along the south line of said Lot 1 or the north line of said Military Reserve  
20 until said line intersects the easterly right-of-way line of the Great Northern Railroad  
21 as now located; thence in a northeasterly direction along the easterly right-of-way line  
22 of said Great Northern Railroad to a point of beginning. (This tract also known as all  
23 the land in Government Lot 1, 21-153-64 to the east of the Great Northern Railway  
24 right-of-way as now located, including all riparian rights in and to the aforesaid  
25 property.), and also all right, title and interest of the Burlington Northern Railroad in  
that certain right-of-way which shall be acquired by the Sellers resulting from the  
closing of the railroad tracts of said Burlington Northern Railroad adjacent to the  
property described herein above.

26 In addition, there is an additional strip of land abutting the above property not greater than  
27 60 feet wide to the center line of the railroad right of way that is also part of this claim by  
28 this plaintiff allowed by this trial court. It is described in Plaintiffs' Exhibit 657 but  
29 excluded from that is the property conveyed by plaintiff in Plaintiffs' Exhibit 656. This  
30 additional property and its legal description is:

31 **Plaintiffs' Exhibit 657**

32 All that portion of Burlington Northern Railroad Company's (formerly Great  
33 Northern Railway Company) Devils Lake to Warwick, North Dakota Branch  
34 Line right of way, now discontinued, being of variable width on each side of  
said Railroad Company's Branch Line Main Track centerline, as originally  
located and constructed upon, over and across Sections 9, 10, 16 and 21,

1 T153N, R64W, 5th P.M., Ramsey County, North Dakota, described as  
2 follows, to-wit:

3 All that portion of said Railroad Company's 350.0 foot wide Branch Line right  
4 of way, being 175.0 feet wide on each side of said Main Track centerline as  
5 originally located and constructed upon, over and across the W1/2NE1/4 of  
6 said Section 10, lying between the North line and the West line of said  
7 W1/2NE1/4, and lying Northeasterly of a line drawn at right angles to said  
8 Main Track centerline distant 350.0 feet Southwesterly of the Northline of the  
9 SW1/4NE1/4 of said Section 10 as measured along a line drawn parallel with  
10 and distant 175.0 feet Southeasterly of, as measured at right angles to said  
11 Main Track centerline; also,

12 All that portion of said Railroad Company's 200.0 foot wide Branch Line right  
13 of way, being 100.0 feet wide on each side of said Main Track centerline as  
14 originally located and constructed upon, over and across the N1/2SW1/4 of  
15 said Section 10 lying between the North line and South line of said  
16 N1/2SW1/4;

17 EXCEPTING THEREFROM: all that portion of the above described parcel  
18 conveyed by Burlington Northern Railroad Company to the City of Devils  
19 Lake by deed dated January 4, 1985, and described as follows:

20 Commencing at the center of said Section 10; thence S88°46'21"W along the  
21 North line of the SW1/4 of said Section 10 a distance of 763.67 feet to the  
22 intersection of a line draw parallel with and distant 100.0 feet Southeasterly  
23 of, as measured at right angles to said Railroad Company's Main Track  
24 centerline; said point of intersection being the Point of Beginning of the parcel  
25 to be described; thence S35°11'05"W parallel with said Main Track centerline  
26 a distance of 201.59 feet; thence N83°11'24"W for a distance of 48.49 feet;  
27 thence S33°49'20"W a distance of 120.37 feet; thence N57°03'44"W a distance  
28 of 160.32 feet to the intersection with a line drawn parallel with and distant  
29 100.0 feet Northwesterly of, as measured at right angles to said Main Track  
30 centerline; thence N35°11'05"E parallel with said Main Track centerline a  
31 distance of 756.46 feet; thence S54°49'29"E a distance of 50.0 feet; thence  
32 N35°11'05"E a distance of 949.06 feet; thence S53°41'13"E a distance of 50.0  
33 feet; thence S53°40'54"E a distance of 31.15 feet to a point on the West line of  
34 the NE1/4 of said Section 10; thence continuing S53°40'54"E in said NE1/4 a  
distance of 50.69 feet; thence S32°33'11"W a distance of 71.85 feet to a point  
on the East line of the NW1/4 of said Section 10; thence N01°22'54"W along  
said East line a distance of 60.14 feet; thence S35°11'05"W parallel with said  
Main Track centerline a distance of 922.99 feet; thence S54°48'55"E a  
distance of 50.0 feet; thence S35°11'05"W parallel with said Main Track  
centerline a distance of 426.26 feet to the True Point of Beginning.

ALSO

All that portion of said Railroad Company's 150.0 foot wide Branch Line right  
of way, being 75.0 feet wide on each side of said Main Track centerline as  
originally located and constructed, situated in the N1/2SW1/4SW1/4 of said

1 Section 10 lying between the North line of said N1/2SW1/4SW1/4 and a line  
2 drawn at right angles to said Main Track centerline distant 200.0 feet  
3 Southwesterly of said North line of the N1/2SW1/4SW1/4 as measured along  
4 said Main Track centerline; also,

5 All that portion of said Railroad Company's 100.0 foot wide Branch Line right  
6 of way, being 50.0 feet wide on each side of said Main Track centerline as  
7 originally located and constructed upon, over and across the SW1/4SW1/4 of  
8 said Section 10, the SE1/4SE1/4 of said Section 9, Government Lot 1 and  
9 Government Lot 3, of said Section 16, lying between the Southline of said  
10 Government Lot 3 and a line drawn at right angles to said Main Track  
11 centerline distant 200.0 feet Southwesterly of the North line of said  
12 SW1/4SW1/4 of said Section 10, as measured along said Main Track  
13 centerline; also,

14 All that portion of said Railroad Company's 200.0 foot wide Branch Line right  
15 of way, being 100.0 feet wide on each side of said Main Track centerline as  
16 originally located and constructed, situated in the Government Lot 4 of said  
17 Section 16, lying between the North line of said Government Lot 4 and a line  
18 drawn at right angles to and distant 330.0 feet Southwesterly of the North line  
19 of the S1/2 of said Government Lot 4, as measured along said Main Track  
20 centerline; also,

21 All that portion of said Railroad Company's 100.0 foot wide Branch Line right  
22 of way, being 50.0 feet wide on each side of said Main Track centerline as  
23 originally located and constructed, situated in the S1/2 of Government Lot 4 of  
24 said Section 16, lying Southerly of a line drawn at right angles to said Main  
25 Track centerline distant 330.0 feet Southwesterly of the North line of said  
26 S1/2 of Government Lot 4, as measured along said Main Track centerline and  
27 lying Northerly of a line drawn at right angles to said Main Track centerline  
28 distant 300.0 feet Northeasterly of the South line of said Government Lot 4, as  
29 measured along said Main Track centerline; also,

30 All that portion of said Railroad Company's 350.0 foot wide Branch Line right  
31 of way, being 175.0 feet wide on each side of said Main Track centerline as  
32 originally located and constructed upon, over and across the S1/2 of  
33 Government 4 and Government Lot 5 of said Section 16, lying between the  
34 South line of said Government Lot 5 and a line drawn at right angles to said  
Main Track centerline distant 300.0 feet Northeasterly of the North line of said  
Government Lot 5 as measured along said Main Track centerline; also,

35 All that portion of said Railroad Company's 100.0 foot wide Branch Line right  
36 of way, being 50.0 feet wide on each side of said Main Track centerline as  
37 originally located and constructed, situated in Government Lot 1 of said  
38 Section 21, lying between the North line of said Government Lot 1 and a line  
39 drawn parallel with said North line of Government Lot 1 and distant 395.0 feet  
40 Southwesterly of said North line of Government Lot 1, as measured along said  
41 Main Track centerline;

SUBJECT, however, to all existing interests, including but not limited to all reservations, rights-of-way and easements of record or otherwise.

Less the property described in:

**Plaintiffs' Exhibit 656 (Legal description of property Plaintiff conveyed)**

All that portion of the Burlington Northern Railroad Company's (formerly Great Northern Railway Company) Devils Lake to Warwick, North Dakota Branch Line right-of-way, now discontinued, being 50 feet in width on each side of said Railroad Company's Branch Line Main Track centerline, as originally located and constructed upon, over and across Government Lot 1 of Section 21, Township 153 North, Range 64 West in Ramsey County, North Dakota.

It being the intention of this deed to convey all interest of the grantors herein in and to the said railroad right-of-way located within said Lot 1 of said section 21. Subject to all oil, gas and mineral reservations and easements and road right-of-ways of every type and description as shown of record in the Register of Deeds Office in and for Ramsey County, North Dakota.

302. Ruddy Binfet's property is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. All of the property including the railroad strip is about 5 acres in size. This property initially started to flood in May of 1994, with flooding increasing gradually until it was completely flooded in April or May of 1997. So, this property had a low elevation range of about 1429.28 feet to 1429.93 feet. Its high elevation was not greater than 1442.03 feet. Additional damages to this property include loss of roads, water and sewer lines, electricity, trees, the cost of removal of a 40x80 storage building and loss of rent from trailer lots.

303. **John and Penelope Knudson** reside at 207 Gray Boulevard, Devils Lake, ND 58301. John and Penelope Knudson own property near or adjacent to Devils Lake, legally described as:

**Plaintiffs' Exhibit 693**

A tract of land located in Government Lot 1 and the NE1/4NW1/4 of Section 8, Township 153 North of Range 64 West of the 5th P.M., Ramsey County, State of North Dakota, being more specifically described as follows:

Beginning at a meander corner being the Northwest corner of Government Lot 1; thence N 81 degrees 48'47"E along the North line of said lot and a meander line, 480.76 feet to the point of beginning; thence continuing N 81 degrees 48'47"E, 102.10 feet; thence S 7 degrees 48'23"E, 238.21 feet; thence S 81 degrees 21'25"W, 101.92 feet; thence N 7 degrees 51'6"W, 239.02 feet to the point of beginning.

Said tract contains .56 acres.

**Plaintiffs' Exhibit 938 is a map of the farmstead located in the above property.**

304. Plaintiffs, **John and Penelope Knudson's** property, located at Lot 4 of Section 8, totals 27.7 acres. It is completely flooded and/or otherwise damaged by the Devils Lake

1 floodwaters. This property initially started to flood in May of 1996. The flooding increased  
2 gradually until May of 1999, when the property became completely inundated. So, the  
3 property had a low elevation range of about 1436.18 feet to 1437.37 feet. Its high elevation  
4 was not greater than 1446.85 feet. Additional damages to this property include loss of the  
5 improvements listed on Exhibit 938, all buildings, trees, shelter belts, evergreens, automatic  
6 water system, two sewer systems, and the farmstead.

7 305. Plaintiff, John Knudson testified for **Bjorn J. and Anna E. Knudson**, Bjorn and Anna  
8 reside at 1105 Agassiz Drive, Apt. A, Devils Lake, ND 58301. John Knudson by his  
9 testimony established his personal knowledge of the property described below owned by  
10 Bjorn J. and Anna E. Knudson.

11 306. Bjorn J. and Anna E. Knudson own property near or adjacent to Devils Lake in Benson  
12 County, North Dakota, and except for Lot 4 which is now owned by John and Penelope  
13 Knudson is legally described as follows:

14 **Plaintiffs' Exhibit 690**

15 Lots Seven (7) and Eight (8) of Section Five (5); Lots Two (2) and Eight (8) of  
16 Section Six (6); Lot Five (5) and the Southeast Quarter of the Northeast  
17 Quarter (SE1/4NE1/4) of Section Seven (7); the Northwest Quarter of the  
18 Southwest Quarter (NW1/4SW1/4), the Northeast Quarter of the Southwest  
19 Quarter (NE1/4SW1/4) and Lots One (1), Two (2), Three (3), Four (4), Five  
20 (5) and Six (6) of Section Eight (8) all in Township One Hundred Fifty-two,  
Range Sixty-five (152-65)

21 307. Bjorn J. and Anna E. Knudson's property at Lots 7 and 8 of Section 5 is totally flooded  
22 and/or otherwise damaged by the Devils Lake floodwaters. This property at Lots 7 and 8,  
23 Section 5 totals, 29.30 acres. This property initially started to flood in April or May of  
24 1994, with flooding gradually increasing until the property was completely flooded and/or  
25 damaged in 2005. All of the land is flooded except for a small portion which is an island  
26 and not accessible. So, the low elevation range of this property is about 1428.34 to 1429.99  
27 feet. The property had a high elevation not greater than 1449.2 feet (except for the island).  
28 Additional damages to this property include loss of sewer, and corrals.

29 308. Bjorn J. and Anna E. Knudson's property at Lot 2, Section 6 totals 44 acres. It is completely  
30 flooded and/or otherwise damaged by the Devils Lake floodwaters. Seven acres are not  
31 flooded but is only accessible through private property. So, it is damaged by some amount  
32 of diminished value. This property initially started to flood in May of 1994. So, it has a low  
33 elevation range of about 1429.28 feet to 1429.93 feet. For the land flooded its elevation is  
34 not greater than 1449.2 feet. Additional damages to this property include loss of fences.

- 1 309. Bjorn J. and Anna E. Knudson's property at Lot 8 of Section 6 totals 40 acres. Of this, 5  
2 acres are flooded and/or otherwise damaged by the Devils Lake floodwaters. The remaining  
3 acreage is not flooded or damaged. This property at Lot 8 of Section 6 initially started to  
4 flood in May of 1994. So, it had a low elevation range of about 1429.28 feet to 1429.93  
5 feet. Its high elevation range for the flooded land was not greater than 1449.2 feet.  
6 Additional damages to the is property include loss of fences.
- 7 310. Bjorn J. and Anna E. Knudson's property at Lot 5 of Section 7, totals 73 acres. Of that, 36  
8 acres are flooded and/or otherwise damaged by the Devils Lake floodwaters. This property  
9 initially started to flood in May of 2004, with flooding increasing gradually through May of  
10 2006. So, it had a low elevation range of about 1448.23 feet to 1448.81 feet. Its high  
11 elevation for the flooded land was not greater than 1449.2 feet. Additional damages to this  
12 property include the loss of feedlot (trows, automatic waters, feed grinding system, the  
13 building, electrical system and well), feeding system, fences and the barn.
- 14 311. Bjorn J. and Anna E. Knudson's property at the Southeast Quarter of the Northeast Quarter  
15 of Section 7 totals 40 acres. Of that 3 acres are flooded and/or otherwise damaged by the  
16 Devils Lake floodwaters. The rest is not flooded or damaged. This property initially started  
17 to flood in May of 2004, with increased gradual flooding through May of 2006. So, it had a  
18 low elevation range of about 1448.23 feet to 1448.81 feet. Its high elevation was not greater  
19 than 1449.2 feet. Additional damages to this property include loss of fences.
- 20 312. Bjorn J. and Anna E. Knudson's property in Section 8 at Lot 1, totals 40.8 acres; at Lot 2, it  
21 totals 12.5 acres; at Lot 3, it totals 0.12 of an acre; at Lot 5, it totals 36.2 acres; and at Lot 6,  
22 it totals 41.7 acres. All these parcels are flooded and/or otherwise damaged by the Devils  
23 Lake floodwaters. This property initially started to flood in April or May of 1994. so, it had  
24 a low elevation range of about 1428.34 feet to 1429.93 feet. The high elevation of this  
25 property was not greater than 1449.2 feet. Additional damages to this property include cost  
26 to remove a trailer home and loss of sewer.
- 27 313. Bjorn J. and Anna E. Knudson's property in Section 8 at the Northwest Quarter of the  
28 Southwest Quarter, which totals 40 acres, and the Northeast Quarter of the Southeast  
29 Quarter, which totals 40 acres is all flooded or damaged by Devils Lake floodwaters. Out of  
30 the 80 acres, 50 acres is completely flooded by the Devils Lake floodwaters. There is no  
31 public access to the remaining 30 acres, thereby diminishing its value. This property  
32 initially started to flood in May of 2002, with gradual increased flooding through May of  
33 2006. So, it had a low elevation range of about 1447.17 to 1447.28 feet. Its high elevation  
34

of the flooded land was not greater than 1449.2 feet. Additional damages to this property include loss of fences.

314. Plaintiffs, **Duane and Orpha Howard** reside at 337 Richter Avenue, Sheyenne, ND 58374.

315. Duane and Orpha Howard own property near or adjacent to Devils Lake, legally described as:

**Plaintiffs' Exhibit 890**

Lots One (1), Two (2), and Three (3), of Section Five (5), and Lot Six (6), of Section Six (6) in Township One Hundred Fifty two (152), Range Sixty-six (66) containing 74.29 acres, more or less.

The Southeast Quarter of the Southwest Quarter (SE1/4SW1/4) and the Southwest Quarter of the Southeast Quarter (SW1/4SE1/4) of Section Thirty-two (32) Township One Hundred Fifty-three (153) North, Range Sixty-six (66) West of the Fifth Principal Meridian.

**Plaintiffs' Exhibit 891**

The Southwest Quarter of the Southeast Quarter (SW1/4SE1/4) of Section Twenty-nine (29) in Township One Hundred Fifty Three (153) North of Range Sixty-six (66),

An undivided one-half interest in and to the following parcels:

Lot One (1) of Section Twenty-eight (28), Lot Four (4) of Section Twenty-nine (29), The Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty nine (29), The Southeast Quarter of the Northwest Quarter (SE1/4NW1/4), the Southwest Quarter of the Northeast Quarter (SW1/4NE1/4), and the North Half of the Northeast Quarter (N1/2NE1/4) (less two acres) Lots One (1), Two (2), Three (3) (less six acres) of Section Thirty-two (32) and Lots One (1) and Two (2) of Section Thirty-three (33) all in Township One Hundred Fifty-three (153) North of Range Sixty-six (66) West of the Fifth P.M.

It is the intention of the parties of the first part to hereby convey any and all mineral rights which it may own on said premises, to the parties of the second part.

**Plaintiffs' Exhibit 893**

The Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty-nine (29), Township One Hundred Fifty-three (153), Range Sixty-six (66), Benson County, North Dakota; and

Lots One (1), Two (2), and Three (3) of Section Six (6), Township One Hundred Fifty-two (152), Range Sixty-six (66), Benson County, North Dakota.

316. Duane and Orpha Howard's property at Lot 1 of Section 5, totals 25 to 30 acres. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in April or May of 1994, with continuous gradual flooding until May of 1996, when it became completely inundated. So, it had a low elevation range

- 1 of about 1428.34 feet to 1429.93 feet. It had a high elevation not greater than 1437.37 feet..  
2 Additional damages to this property include loss of fencing.
- 3 317. Duane and Orpha Howard's property at Lot 2 of Section 5 totals 20 to 25 acres. It is  
4 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
5 property initially started to flood in April or May of 1994, with continuous gradual flooding  
6 until May of 1996, when it became completely inundated. So, this property had a low  
7 elevation range of about 1428.34 feet to 1429.93 feet. Its high elevation was not greater  
8 than 1437.37 feet. Additional damages to this property include loss of fencing.
- 9 318. Duane and Orpha Howard's property at Lot 3 of Section 5, totals 20 to 25 acres. It is  
10 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
11 property initially started to flood in April or May of 1994, with continuous gradual flooding  
12 until May of 1996, when it became completely inundated. So, it had a low elevation range  
13 of about 1428.34 feet to 1429.93 feet. Its high elevation was not greater than 1437.37 feet.  
14 Additional damages to this property includes loss of fencing.
- 15 319. Duane and Orpha Howard's property at Lot 6 of Section 6 totals 20 to 25 acres. It is  
16 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
17 property initially started to flood in April or May of 1994, with continuous gradual flooding  
18 until May of 1996, when it became completely inundated. So, it had a low elevation range  
19 of 1428.34 feet to about 1429.93 feet. Its high elevation for the property was not greater  
20 than 1437.37 feet. Additional damages to this property include loss of fencing.
- 21 320. Duane and Orpha Howard's property at the Southeast Quarter of the Southwest Quarter and  
22 the Southwest Quarter of the Southeast Quarter of Section 32, totals 80 acres. It is  
23 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
24 property initially started to flood in April or May of 1995, with continuous gradual flooding  
25 until May of 1996, when it became completely inundated. So, it had a low elevation range  
26 of about 1431.74 feet to 1435.26 feet. The property's high elevation was not greater than  
27 1437.37 feet. Additional damages to this property include loss of fencing.
- 28 321. Duane and Orpha Howard's property at the Southwest Quarter of the Southeast Quarter of  
29 Section 29, totals 40 acres. It is completely flooded and/or otherwise damaged by the Devils  
30 Lake floodwaters. Of this acreage, 30 acres is completely under water and 10 acres are  
31 inaccessible except across private property. So, it also has a diminished value and is  
32 damaged. This property initially started to flood in April or May of 1994, with continuous  
33 gradual flooding until May of 1996, when it became completely inundated or damaged. So,  
34 it had a low elevation range of about 1428.34 feet to 1429.93 feet. The property had a high

1 elevation not greater than 1437.37 feet for the land actually flooded. Additional damages to  
2 this property include loss of fences and a well.

3 322. Duane and Orpha Howard's property at Lot 4 of Section 29 totals about 30 acres. Of this  
4 acreage all but six acres is completely flooded and/or otherwise damaged by the Devils Lake  
5 floodwaters. The remaining six acres is a hill access by a trail through some woods.  
6 Plaintiff did not testify it was accessible only by private property of another. Nor did  
7 plaintiff indicate its use. It could be farm or pastureland. It could be woodland. This court  
8 will not speculate and so cannot find these six acres have been damaged. This property  
9 initially started to flood in June of 1997, with continuous gradual flooding until June of  
10 1999. So, the property has a low elevation range of about 1442.06 feet to 1442.32 feet. The  
11 high elevation of the land actually flooded was not greater than 1447.01 feet. Additional  
12 damages to this property include loss of the farmstead site, buildings, eight bins, two pole  
13 barns, 500-600 feet of windbreak fence, a stockamatics over the whole thing, nine wells, 1/2  
14 mile or 4 rows of shelterbelts, corral, and the pole and wire for the REC and electrical  
15 company.

16 323. Duane and Orpha Howard's property at the Southwest Quarter of the Southwest Quarter of  
17 Section 29 (a half interest) is completely flooded and/or otherwise damaged by the Devils  
18 Lake floodwaters. This property initially started to flood in April or May of 1998, with  
19 continuous gradual flooding until June of 1999 when it all became inundated. So, it had a  
20 low elevation range of about 1443.09 feet to 1444.62 feet. It had a high elevation not  
21 greater than 1447.01 feet. Additional damages to this property include loss of fencing.

22 324. Duane and Orpha Howard's property at the Southeast Quarter of the Northwest Quarter of  
23 Section 32 is all flooded and/or otherwise damaged by the flooding from Devils Lake. This  
24 property initially started to flood in April or May of 1998, with continuous gradual flooding  
25 until June of 1999. So, it had a low elevation range of about 1443.09 feet to 1444.62 feet.  
26 The property's high elevation was not greater than 1447.01 feet. Additional damages  
27 include loss of fencing.

28 325. Plaintiffs, Duane and Orpha Howard's property at the Southwest Quarter of the Northeast  
29 Quarter of Section 32 is completely flooded and/or otherwise damaged by the Devils Lake  
30 floodwaters. This property initially started to flood in April or May of 1998, with  
31 continuous gradual flooding until June of 1999. So, it had a low elevation range of about  
32 1443.09 feet to 1444.62 feet. The property's high elevation was not greater than 1447.01  
33 feet. Additional damages to this property include loss of fences and a well.  
34

- 1 326. Duane and Orpha Howard's property at Lot 1 of Section 32, totals 36.75 acres. It is  
2 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
3 property initially started to flood in April or May of 1994, with continuous gradual flooding  
4 until completely flooded. So, it had a low elevation range of 1428.34 feet to 1429.93 feet.  
5 Its high elevation is not greater than 1449.20 feet. Additional damages to this property  
6 include loss of fencing.
- 7 327. Duane and Orpha Howard's property at Lot 2 of Section 32, totals 36.5 acres. It is  
8 completely under water and/or otherwise damaged by the Devils Lake floodwaters. This  
9 property initially started to flood in April or May of 1994, with continuous gradual flooding  
10 until completely flooded. So, it had a low elevation range of about 1428.34 feet to 1429.93  
11 feet. The property's high elevation was not greater than 1449.20 feet. Additional damages  
12 include loss of fencing.
- 13 328. Duane and Orpha Howard's property at Lot 3 of Section 32, totals 36.98 acres, is completely  
14 under water and/or otherwise damaged by the Devils Lake floodwaters. This property  
15 initially started to flood in April or May of 1994, with continuous gradual flooding until  
16 completely flooded. So, its low elevation range is about 1428.34 feet to 1429.93 feet. Its  
17 high elevation is not greater than 1449.2 feet. Additional damages to this property include  
18 loss of fencing.
- 19 329. Duane and Orpha Howard's property at Lot 1 of Section 33, totals 26.20 acres. It is  
20 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
21 property initially started to flood in April or May of 1994, with continuous gradual flooding  
22 until completely flooded. So, it has a low elevation range of about 1429.34 feet to 1429.93  
23 feet. Its high elevation was not greater than 1449.2 feet.
- 24 330. Duane and Orpha Howard's property at Lot 2 of Section 33 is 5.21 acres. It is completely  
25 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
26 started to flood in April or May of 1994, with continuous gradual flooding until completely  
27 flooded. So, it has a low elevation range of about 1428.34 feet to 1429.93 feet. Its high  
28 elevation was not greater than 1449.2 feet.
- 29 331. Duane Howard, next-of-kin, testified for plaintiff **Floyd Howard (now deceased)**. Duane  
30 Howard established by his testimony personal knowledge of Floyd Howard's property.
- 31 332. Plaintiff, Duane Howard, next-of-kin of Floyd Howard (deceased) or his estate owns  
32 property near or adjacent to Devils Lake in Benson County, State of North Dakota, legally  
33 described as:

34 **Plaintiffs' Exhibit 894**

1 The Southeast Quarter of the Southwest Quarter (SE1/4 SW1/4) of Section  
2 Ten (10), Township One Hundred Fifty-two (152) North of Range Sixty-six  
3 (66),

4 Floyd and his wife Stella have both passed away. Each of their wills provided in part as  
5 follows:

6 **Plaintiffs' Exhibit 929 (Floyd Howard's Will)**

- 7 A. To my son, Duane F. Howard, the Southwest Quarter of the Southwest  
8 Quarter (SW1/4SW1/4) of Section Twenty-nine (29), Township One  
9 Hundred Fifty-three (153), Range Sixty-six (66), Benson County, North  
10 Dakota;  
11 B. To my son, Lawrence C. Howard, the Southeast Quarter of the Southwest  
12 Quarter (SE1/4SW1/4) of Section Ten (10), Township One Hundred Fifty-  
13 two (152), Range Sixty-six (66), Benson County, North Dakota;  
14 C. To my grandchildren, Luana J. Poulsen, Anelle J. Howard, Marena J.  
15 Howard, the Southwest Quarter of the Southeast Quarter (SW1/4SE1/4), the  
16 Southeast Quarter of the Southwest Quarter (SE1/4SW1/4), Lot Six (6), and  
17 Auditor's Lots Three (3) and Five (5), all in Section Five (5), Township One  
18 Hundred Fifty (150), Range Sixty-six (66), Eddy County, North Dakota,  
19 share and share alike.  
20 D. All the rest, residue and remainder of my property, wheresoever situated, I  
21 give and devise to my sons, Duane F. Howard and Lawrence C. Howard,  
22 share and share alike.

23 **Plaintiffs' Exhibit 928 (Stella Howard's Will)**

- 24 A. To my son, Duane F. Howard, the Southwest Quarter of the Southwest  
25 Quarter (SW1/4SW1/4) of Section Twenty-nine (29), Township One  
26 Hundred Fifty-three (153), Range Sixty-six (66), Benson County, North  
27 Dakota; Lots One (1), Two (2) and Three (3) of Section Six (6), Township  
28 One Hundred Fifty-two (152), Range Sixty-six (66), Benson County, North  
29 Dakota;  
30 B. To my son, Lawrence C. Howard, the Southeast Quarter of the Southwest  
31 Quarter (SE1/4SW1/4) of Section Ten (10), Township One Hundred Fifty-  
32 two (152), Range Sixty-six (66), Benson County, North Dakota;  
33 C. To my grandchildren, Luana J. Poulsen, Anelle J. Howard, Marena J.  
34 Howard, the Southwest Quarter of the Southeast Quarter (SW1/4SE1/4), the  
Southeast Quarter of the Southwest Quarter (SE1/4SW1/4), Lot Six (6), and  
Auditor's Lots Three (3) and Five (5), all in Section Five (5), Township One  
Hundred Fifty (150), Range Sixty-six (66), Eddy County, North Dakota;  
share and share alike.  
D. All the rest, residue and remainder of my property, wheresoever situated, I  
give and devise to my sons, Duane F. Howard and Lawrence C. Howard,  
share and share alike.

1 333. Floyd Howard's property at the Southeast Quarter of the Southwest Quarter in Section 10, is  
2 a 40 acre parcel. It is completely flooded and/or otherwise damaged by the Devils Lake  
3 floodwaters. This property initially started to flood in May or June of 1995, with continued  
4 gradual flooding through June 1996 when it became completely flooded. So, the property  
5 had a low elevation range of about 1433.83 feet to 1435.69 feet. Its high elevation was not  
6 greater than 1437.73 feet. Additional damages to this property include loss of fencing.

7 334. Plaintiff, Karin Konzak testified as next-of-kin and in regards to the property and affairs of  
8 Donald and Mary Konzak (deceased). Karin Konzak resides at 7575 51<sup>st</sup> Street Northeast,  
9 Devils Lake, ND 58301. By her testimony she established personal knowledge of the  
10 property of Donald and Mary Konzak. The claim was amended as follows:

11 AMENDED COMPLAINT AS AMENDED ON RECORD

12 Plaintiffs **Donald and Mary Konzak** are the fee owners of the following real property  
13 located in Grand Harbor, Poplar Grove, and Pelican Townships, Ramsey County:  
14 ~~Lots One (1), Four (4), Five (5) and Six (6) of Section Five (5); and the~~  
15 ~~Northwest Quarter (NW1/4) of Section Five (5) (also known as the South Half~~  
16 ~~of the Northwest Quarter (S1/2 NW1/4) and Lots Two (2) and Three (3) of~~  
17 ~~Section Five (5)); and the North Half of the Southwest Quarter (N1/2 SW1/4)~~  
18 ~~of Section Five (5); and the Southwest Quarter of the Southwest Quarter~~  
19 ~~(SW1/4 SW1/4) of Section Five (5); Lot Five (5) of Section Seven (7); and the~~  
20 ~~Northeast Quarter (NE1/4) of Section Seven (7); the West Half of the~~  
21 ~~Southeast Quarter (W1/2 SE1/4) of Section Seven (7); and the Northeast~~  
22 ~~Quarter of the Northwest Quarter (NE1/4 NW1/4) of Section Seven (7); Lots~~  
23 ~~One (1) and Two (2), and the Northwest Quarter of the Northwest Quarter~~  
24 ~~(NW1/4 NW1/4) of Section Eight (8); all in Township One Hundred Fifty-~~  
25 ~~three (153) North, of Range Sixty-five (65) West of the Fifth Principal~~  
26 ~~Meridian; and~~

27  
28 The Southwest Quarter (SW1/4) of Section Thirty-two (32) in Township One  
29 Hundred Fifty-four (154) North, of Range Sixty-five (65) West of the Fifth  
30 Principal Meridian.

31 All of the East Half of the Southeast Quarter (E1/2 SE1/4) of Section Ten (10),  
32 lying North of the Burlington Northern Railroad right-of-way; The West Half  
33 of the Northwest Quarter (W1/2 NW1/4) of Section Eleven (11); the Southwest  
34 Quarter (SW1/4) of Section Eleven (11) minus the following described real  
estate:

Commencing at a point on the West boundary line of said Section  
Eleven (11) where said section line intersects the South boundary line  
of the Burlington Northern Railroad right-of-way, thence South on  
the section line to the South boundary line of said Section Eleven

(11); thence East approximately 600 feet on the South boundary line of said Section Eleven (11) to the proposed Channel "A" West right-of-way boundary, thence in a Northerly direction along the said West right-of-way boundary of the said proposed Channel "A" to the Burlington Northern Railroad right-of-way and West of the proposed Channel "A" right-of-way to the point of beginning;

and the West Half (W1/2) of Section Fourteen (14); all in Township One Hundred Fifty-four (154) North, of Range Sixty-five (65) West of the Fifth Principal Meridian; Reserving all oil, gas and other minerals presently owned by Grantors and reserving right of ingress and egress for recreational and hunting purposes to Grantors.

The Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4), also known as Lot One (1), of Section Fifteen (15), in Township One Hundred Fifty-four (154), Range Sixty-five (65).

The South Half (S1/2) of Section Sixteen, Township One Hundred Fifty-four, Range Sixty-six (16-154-66), Ramsey County, North Dakota.

~~Lots One (1), Four (4), Five (5) and Six (6) of Section Five (5); and the Northwest Quarter (NW1/4) of Section Five (5) (also known as the South Half of the Northwest Quarter (S1/2 NW1/4) and Lots Two (2) and Three (3) of Section Five (5)); and the North Half of the Southwest Quarter (N1/2 SW1/4) of Section Five (5); and the Southwest Quarter of the Southwest Quarter (SW1/4 SW1/4) of Section Five (5); Lot Five (5) of Section Seven (7); and the Northeast Quarter (NE1/4) of Section Seven (7); the West Half of the Southeast Quarter (W1/2 SE1/4) of Section Seven (7); and the Northeast Quarter of the Northwest Quarter (NE1/2 NW1/4) of Section Seven (7); Lots One (1) and Two (2), and the Northwest Quarter of the Northwest Quarter (NW1/4 NW1/4) of Section Eight (8); all in Township One Hundred Fifty-three (153) North, of Range Sixty-five (65) West of the Fifth Principal Meridian; and~~

The Northeast Quarter (NE1/4) of Section Thirty-one (31); the North Half of the Southeast Quarter (N1/2 SE1/4) of Section Thirty-one (31); ~~and the Southwest Quarter (SW1/4) of Section Thirty-two (32);~~ all in Township One Hundred Fifty-four (154) North, of Range Sixty-five (65) West of the Fifth Principal Meridian.

335. Plaintiffs, Donald and Mary Konzak owned property near or adjacent to Devils Lake in Ramsey County, North Dakota and is legally described as:

**Plaintiffs' Exhibit 478**

All of the East Half of the Southeast Quarter (E1/2SE1/4) of Section Ten (10), lying North of the Burlington Northern Railroad right-of-way; The West Half

1 of the Northwest Quarter (W1/2NW1/4 ) of Section Eleven (11); the  
2 Southwest Quarter (SW1/4) of Section Eleven (11) minus the following  
3 described real estate:

4 Commencing at a point on the West boundary line of said Section Eleven (11)  
5 where said section line intersects the South boundary line of the Burlington  
6 Northern Railroad right-of-way, thence South on the section line to the South  
7 boundary line of said Section Eleven (11); thence East approximately 600 ft.  
8 on the South boundary line of said Section Eleven (11) to the proposed  
9 Channel "A" West right-of-way boundary, thence in a Northerly direction  
10 along the said West right-of-way boundary of the said proposed Channel "A"  
11 to the Burlington Northern Railroad right-of-way and West of the proposed  
12 Channel "A" right-of-way to the point of beginning;

13 and the West Half (W1/2) of Section Fourteen (14); all in Township One  
14 Hundred Fifty-four (154) North, of Range Sixty-five (65) West of the Fifth  
15 Principal Meridian; Reserving all oil, gas and other minerals presently owned  
16 by Grantors and reserving right of ingress and egress for recreational and  
17 hunting purposes to Grantors.

18 **Plaintiffs' Exhibit 475**

19 The West Half of the Northwest Quarter (W1/2NW1/4) of Section Eleven (11)  
20 and the Southwest Quarter (SW1/4) of Section Eleven (11), less the following  
21 tract of land: commencing at a point on the West boundary line of Section 11  
22 where said section line intersects the South boundary line of the Burlington  
23 Northern right-of-way, thence South on the section line to the South boundary  
24 line of Section 11; thence East approximately 600 feet on the South boundary  
25 line of Section 11 to the proposed Channel "A" West right-of-way boundary;  
26 thence in a Northerly direction along the said West right-of-way boundary of  
27 the said proposed channel "A" to the Burlington Northern Railroad South  
28 right-of-way line; thence in a Westerly direction along the said Burlington  
29 Northern Railroad right-of-way to the point of beginning; and the West Half  
30 (W1/2) of Section Fourteen (14); all property being in Township One Hundred  
31 Fifty-four (154), Range Sixty-five (65), Ramsey County, North Dakota.

32 **Plaintiffs' Exhibit 479**

33 Lot One (1) (also known as the Southeast Quarter of the Southeast Quarter) of  
34 Section Fifteen (15) in Township One Hundred Fifty-Four (154) North, Range  
Sixty-Five (65) West of the Fifth Principal Meridian, in the County of  
Ramsey, State of North Dakota;

**Plaintiffs' Exhibit 476**

The Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4), also known as  
Lot One (1), of Section Fifteen (15), Township One Hundred Fifty-four (154),  
Range Sixty-five (65).

**Plaintiffs' Exhibit 951**

1 The South Half (S1/2) of Section Sixteen, Township One Hundred Fifty-four,  
2 Range Sixty-six (16-154-66), Ramsey County, North Dakota.

3 **Plaintiffs' Exhibit 556**

4 Lots One (1), Four (4), Five (5) and Six (6) of Section Five (5); and the  
5 Northwest Quarter (NW1/4) of Section Five (5) (also known as the South Half  
6 of the Northwest Quarter (S1/2NW1/4) and Lots Two (2) and Three (3) of  
7 Section Five (5)); and the North Half of the Southwest Quarter (N1/2SW1/4)  
8 of Section Five (5); and the Southwest Quarter of the Southwest Quarter  
9 (SW1/4SW1/4) of Section Five (5); Lot Five (5) of Section Seven (7); and the  
10 Northeast Quarter (NE1/4) of Section Seven (7); the West Half of the  
11 Southeast Quarter (W1/2SE1/4) of Section Seven (7); and the Northeast  
12 Quarter of the Northwest Quarter (NE1/4NW1/4) of Section Seven (7); Lots  
13 One (1) and Two (2), and the Northwest Quarter of the Northwest Quarter  
14 (NW1/4NW1/4) of Section Eight (8); all in Township One Hundred Fifty-  
15 three (153) North, of Range Sixty-five (65) West of the Fifth Principal  
16 Meridian; and

17 The Northeast Quarter (NE1/4) of Section Thirty-one (31); the North Half of  
18 the Southeast Quarter (N1/2SE1/4) of Section Thirty-one (31); and the  
19 Southwest Quarter (SW1/4) of Section Thirty-two (32); all in Township One  
20 Hundred Fifty-four (154) North, of Range Sixty-five (65) West of the Fifth  
21 Principal Meridian;

22 All subject to oil, gas and mineral reservations of record, and further subject to  
23 all road right-of-ways and other easements, including Federal wildlife  
24 easements for the propagation of waterfowl, of record and recorded in the  
25 office of the Register of Deeds, in and for Ramsey County, North Dakota.

26 **Plaintiffs' Exhibit 952**

27 The South Half (S1/2) of Section Sixteen (16), in Township One Hundred  
28 Fifty-four (154) North, Range Sixty-six (66) West.

29 All of the East Half of the Southeast Quarter (E1/2SE1/4) of Section Ten (10),  
30 lying North of the Burlington Northern Railroad right-of-way, in Township  
31 One Hundred Fifty-four (154) North, Range Sixty-five (65) West.

32 The West Half of the Northwest Quarter (W1/2NW1/4) of Section Eleven  
33 (11) and the Southwest Quarter (SW1/4) of Section Eleven (11), less the  
34 following tract of land: commencing at a point on the West boundary line of  
Section 11 where said section line intersects the South boundary line of the  
Burlington Northern right-of-way; thence South on the section line to the  
South boundary line of Section 11; thence East approximately 600 feet on  
the South boundary line of Section 11 to the proposed Channel "A" West  
right-of-way boundary; thence in a Northerly direction along the said West  
right-of-way boundary of the said proposed Channel "A" to the Burlington

1 Northern Railroad South right-of-way line; thence in a Westerly direction  
2 along the said Burlington Northern Railroad right-of-way to the point of  
3 beginning; and the West Half (W1/2) of Section Fourteen (14); all property  
4 being in Township One Hundred Fifty-four (154) North, Range Sixty-five  
5 (65) West.

6 The Southeast Quarter of the Southeast Quarter (SE1/4SE1/4), also known  
7 as Lot One (1), of Section Fifteen (15), in Township One Hundred Fifty-  
8 four (154) North, Range Sixty-five (65) West.

9 The Northeast Quarter (NE1/4) and the North Half of the Southeast Quarter  
10 (N1/2SE1/4) of Section Thirty-one (31), in Township One Hundred Fifty-  
11 four (154) North, Range Sixty-five (65) West.

12 **Plaintiffs' Exhibit 474**

13 S1/2, Section 16, T 154 N, R 66 W;

14 All of the E1/2 of SE1/4 of Section 10 lying North of the Burlington Northern  
15 Railroad right-of-way, T 154 N, R 65 W;

16 W1/2 of the NW1/4, and the SW1/4, Section 11, T 154 N, R 65 W, Ramsey  
17 County North Dakota, less the following tract: commencing at a point on the  
18 West boundary line of Section 11 where the section line intersects the South  
19 boundary line of the Burlington Northern right-of-way; thence South on the  
20 section line to the South boundary line of Section 11; thence East  
21 approximately 600 feet on the South boundary line of Section 11 to the  
22 Channel "A" West right-of-way boundary; thence in a Northerly direction  
23 along the West right-of-way boundary and the of Channel "A" to the  
24 Burlington Northern Railroad right-of-way South boundary; thence in a  
25 Westerly direction along the Burlington Northern right-of-way to the point of  
26 beginning;

27 W1/2, Section 14, T 154 N, R 65 W;

28 SE1/4 of the SE1/4, also known as Lot 1, Section 15, T 154 N, R 65 W;

29 NE1/4, and the N1/2 of the SE1/4, Section 31, T 154 N, R 65 W.

30 **Plaintiffs' Exhibit 477**

31 Trust Agreement for the MaryAnn Konzak Trust

32 **Plaintiffs' Exhibit 468A**

33 S 1/2, Section 16, T 154 N, R 66 W;

34 All of the E 1/2 of SE 1/4 of Section 10 lying North of the Burlington  
Northern Railroad right-of-way, T 154 N, R 65 W;

W 1/2 of the NW 1/4, and the SW 1/4, Section 11, T 154 N, R 65 W, Ramsey  
County North Dakota, less the following tract: commencing at a point on the

1 West boundary line of Section 11 where the section line intersects the South  
2 boundary line of the Burlington Northern right-of-way; thence South on the  
3 section line to the South boundary line of Section 11; thence East  
4 approximately 600 feet on the South boundary line of Section 11 to the  
5 Channel "A" West right-of-way boundary; thence in a Northerly direction  
6 along the West right-of-way boundary and the of Channel "A" to the  
7 Burlington Northern Railroad right-of-way South boundary; thence in a  
8 Westerly direction along the Burlington Northern right-of-way to the point of  
9 beginning;

10 W 1/2, Section 14, T 154 N, R 65 W;

11 With all appurtenances;

12 **Plaintiffs' Exhibit 468B**

13 SE 1/4 of the SE 1/4, also known as Lot 1, Section 15, T 154 N, R 65 W;

14 With all appurtenances;

15 **Plaintiffs' Exhibit 468**

16 NE 1/4, and the N 1/2 of the SE 1/4, Section 31, T 154 N, R 65 W.

17 336. Donald and Mary Konzak's property at the South half of Section 16 Township 154 North,  
18 Range 66 West, is completely flooded and/or otherwise damaged by the Devils Lake  
19 floodwaters. This is in Pelican Township. It is all flooded except for a one or two acre  
20 island which is not accessible. This property initially started to flood in May of 1995, and  
21 became almost completely flooded in May 1997. So, it had a low elevation range of about  
22 1433.83 feet to 1435.26 feet. The property's high elevation was not greater than 1449.20  
23 feet (except for the island). Much of the land is less than 1442.06 feet. Additional damages  
24 include loss of fencing.

25 337. Donald and Mary Konzak's property at the West half of Section 11, Township 154 North,  
26 Range 65 West (except for the Northeast and the Southeast Quarters of the Northwest  
27 Quarter) is completely flooded and/or otherwise damaged by the Devils Lake floodwaters.  
28 This is in Grand Harbor Township. All of this property is either flooded or impacted so it is  
29 all damaged. Channel A runs through this property. As the Devils Lake elevation climbed  
30 the lake has backed up into the channel and spread out into this property leaving pools of  
31 water and saturated soil. Consequently, all of it is damaged by the floodwaters. This  
32 property initially started to flood in May of 1995. So, it had a low elevation range of  
33 1433.83 feet to 1435.26 feet. Its high elevation for the flooded land is not greater than  
34 1449.2 feet. Additional damages to this property include loss of fencing.

338. Plaintiffs, Donald and Mary Konzak own the West half of Section 14. It is flooded and/or  
otherwise damaged by the Devils Lake floodwaters. This is in Grand Harbor Township.  
This property initially started to flood in May of 1995 and became completely flooded or  
otherwise damaged in May, 1997. So, it had a low elevation range of about 1433.83 feet to

1 1435.26 feet. Its high elevation was not greater than 1442.03 feet. Additional damages to  
2 this property include loss of fencing.

3 339. Donald and Mary Konzak's property at the Southeast Quarter of the Southeast Quarter of  
4 Section 15 (Lot 1) totals 39.85 acres. Of this, 20 acres are flooded and/or otherwise  
5 damaged by the Devils Lake floodwaters. The usable part is in the northwest, southwest and  
6 a little bit of the northeast portion, because the water runs diagonal. It initially started to  
7 flood in May of 1995 and became flooded as described above in May 1997. So, it had a low  
8 elevation range of 1433.83 feet to 1435.26 feet. The property's high elevation for the  
9 portion flooded was not greater than 1449.2 feet.

10 340. Donald and Mary Konzak's property at Lot 1, Section 14 totals 39.48 acres. It has been  
11 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
12 started to flood in May of 1995 and became completely flooded in May 1997. so, it had a  
13 low elevation range of about 1433.83 feet to 1435.26 feet. Its high elevation was not greater  
14 than 1442.03 feet.

15 341. Karin Konzak testified for plaintiff's **Karin Konzak and Kathleen Konzak**, Kathleen  
16 resides at 9116 Heatherton Ridge Drive, Savage, MN 55378, and Karin Konzak resides at  
17 7575 - 51<sup>st</sup> Street Northeast, Devils Lake, ND 58301. Karin Konzak established by her  
18 testimony personal knowledge of the property of herself and Kathleen Konzak. The  
19 Complaint was amended as follows:

20 AMENDED COMPLAINT AS AMENDED ON RECORD

21 Plaintiffs **Karin A. Konzak and Kathleen E. Konzak (aka Kathleen E.**  
22 **Lerick)** are the fee owners of the following real property located in Grand  
23 Harbor and Poplar Grove Townships, Ramsey County:

24 The Southwest quarter (SW1/4) of Section 32, Township 154 North,  
25 Range 65 West, Ramsey County, North Dakota;

26 and

27 Lots 1, 4, 5 & 6, the Northwest quarter (NW1/4), the North half of  
28 the Southwest quarter (N1/2SW1/4), and the Southwest quarter of the  
29 Southwest quarter (SW1/4SW1/4) of Section Five (5); Lot 5, the  
30 Northeast quarter (NE1/4), the West half of the Southeast quarter  
31 (W1/2SE1/4), and the Northeast quarter of the Northwest quarter  
32 (NE1/4NW1/4) of Section Seven (7); and Lots 1 & 2 and the  
33 Northwest quarter of the Northwest quarter (NW1/4NW1/4) of  
34 Section Eight (8); all in Township 153 North, Range 65 West,  
Ramsey County, North Dakota.

1 342. Karin Konzak and Kathleen Konzak own property near or adjacent to Devils Lake, in  
2 Ramsey County, North Dakota. It is south of Highway 2 and adjacent to Six Mile Bay. It is  
3 legally described as:

4 **Plaintiffs' Exhibit 469**

5 Lots One (1), Four (4), Five (5) and Six (6) of Section Five (5); and the  
6 Northwest Quarter (NW1/4) of Section Five (5) (also known as the South Half  
7 of the Northwest Quarter (S1/2NW1/4) and Lots Two (2) and Three (3) of  
8 Section Five (5)); and the North Half of the Southwest Quarter (N1/2 SW1/4)  
9 of Section Five (5), and the Southwest Quarter of the Southwest  
10 Quarter (SW1 /4 SW1/4) of Section Five (5) ; Lot Five (5) of Section Seven  
11 (7); and the Northeast Quarter (NE1/4) of Section Seven (7); the West Half of  
12 the Southeast Quarter (W1/2 SE1/4) of Section Seven (7); and the Northeast  
13 Quarter of the Northwest Quarter (NE1/4 NW1/4) of Section Seven (7); Lots  
14 One (1) and Two (2), and the Northwest Quarter of the Northwest Quarter  
15 (NW1/4 NW1/4) of Section Eight (8); all in Township One Hundred Fifty-  
16 Three (153) North, of Range Sixty-five (65) West of the Fifth Principal  
17 Meridian; and

18 The Southwest Quarter (SW1/4) of Section Thirty-two (32) in Township One  
19 Hundred Fifty-four (154) North, of Range Sixty-five (65) West of the Fifth  
20 Principal Meridian.

21 343. Karin Konzak and Kathleen Konzak's property at Lot 1 of Section 5 is 14.20 acres. Of this  
22 acreage, 7.0 acres are flooded and/or otherwise damaged by the Devils Lake floodwaters.  
23 The remaining acres are not flooded or damaged. This property initially started to flood in  
24 May of 1995, and became flooded to its current condition in May 1997. So it had a low  
25 elevation of about 1433.83 feet to 1435.26 feet. The high elevation of the flooded land did  
26 not exceed 1442.03 feet. Additional damages to this property include loss of the well, septic  
27 system, and fence.

28 344. Karin Konzak and Kathleen Konzak's property at Lot 4 of Section 5 is 19.85 acres. It is  
29 completely flooded and/or otherwise damaged by the flooding from Devils Lake. This  
30 property initially started to flood in May of 1995 and became completely flooded in May  
31 1997. So, it had a low elevation range of about 1433.83 feet to 1435.26 feet. Its high  
32 elevation was not greater than 1442.03 feet. Additional damages include loss of fencing.

33 345. Karin Konzak and Kathleen Konzak's property at Lot 5 of Section 5 is 24.7 acres. It is all  
34 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
started to flood in May of 1995, and became completely flooded in May 1997. so, it had a  
low elevation range of about 1433.83 feet to 1435.26 feet. Its high elevation was not greater

1 than 1442.03 feet. Additional damages to this property include loss of fences and a pole  
2 barn.

3 346. Karin Konzak and Kathleen Konzak's property at Lot 6 of Section 5 is 40.40 acres. It is all  
4 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
5 started to flood in May of 1995 and became completely flooded in May 1997. So, it had a  
6 low elevation range of 1433.83 feet to 1435.26 feet. The high elevation of the property was  
7 not greater than 1442.03 feet. Additional damages to this property include loss of trees.

8 347. Karin Konzak and Kathleen Konzak's property at the Southwest Quarter of the Southwest  
9 Quarter of Section 5 totals 40 acres. It is all flooded and/or otherwise damaged by the  
10 Devils Lake floodwaters. This property initially started to flood in May of 1995 and became  
11 completely flooded in May 1997. so, it had a low elevation range of 1433.83 feet to  
12 1435.26 feet. The high elevation of the property was not greater than 1442.03 feet.  
13 Additional damages to this property include loss of fences and a stock pond.

14 348. Karin Konzak and Kathleen Konzak's property at the Northwest Quarter and the Northeast  
15 Quarter of the Southwest Quarter totals 80 acres. It is all flooded and/or otherwise damaged  
16 by the Devils Lake floodwaters. This property initially started to flood in May of 1995 and  
17 became completely flooded or otherwise damaged in May 1997. so, it had a low elevation  
18 range of about 1433.83 feet to 1435.26 feet. The high elevation of the property was not  
19 greater than 1442.03 feet.

20 349. Karin Konzak and Kathleen Konzak's property at the South half of the Northwest Quarter  
21 of Section 5 totals 80 acres. (it is also referred to as the Northwest Quarter of Section 5). It  
22 is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. Most of it  
23 is flooded. That portion that is not has water disbursed through it in an irregular manner  
24 making the total acreage unusable and/or inaccessible. This property initially started to  
25 flood in May of 1995 and became completely flooded or otherwise damaged in May 1997.  
26 so, it had a low elevation range of 1433.83 feet to 1435.26 feet. The high elevation of the  
27 bulk of property was not greater than 1442.03 feet. But, there may be some unusable  
28 spotted portions of this acreage greater than 1449.2 feet. Additional damages to this  
29 property include loss of fencing.

30 350. Karin Konzak and Kathleen Konzak's property at Lot 1 of Section 8 is 26.33 acres. It is all  
31 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
32 started to flood in May of 1995 and became completely flooded in May 1997. So, it had a  
33 low elevation range of about 1433.83 feet to 1435.26 feet. The high elevation of the  
34

property was not greater than 1442.03 feet. Additional damages to this property include loss of fencing and trees.

351. Karin Konzak and Kathleen Konzak's property at Lot 2 of Section 8 is 31.5 acres. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1995 and became completely flooded in May 1997. So, it had a low elevation range of about 1433.83 feet to 1435.26 feet. The high elevation of the property was not greater than 1442.03 feet. Additional damages to this property include loss of fencing and trees.

352. Karin Konzak and Kathleen Konzak's property at the Northwest Quarter of the Northwest Quarter of Section 8 is all under water and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1995 and became completely flooded in May 1997. So, it had a low elevation range of about 1433.83 feet to 1435.26 feet. The high elevation of the property was not greater than 1442.03 feet. Additional damages to this property include loss of fencing and trees.

353. Karin Konzak and Kathleen Konzak's property at Lot 5 of Section 7 is 36.0 acres. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1995 and became completely flooded in May 1997. so, it had a low elevation range of about 1433.83 feet to 1435.26 feet. The high elevation of the property was not greater than 1442.03 feet. Additional damages to this property include loss of trees and fencing.

354. Karin Konzak and Kathleen Konzak's property at the remaining portions of Section 7 (the Northeast Quarter) (the Northeast Quarter of the Northwest Quarter) and (the West half of the Southeast Quarter) is all flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1995 and became completely flooded in May 1997. So, it had a low elevation range of about 1433.83 feet to 1435.26 feet. The high elevation of the property was not greater than 1442.03 feet. Additional damages to this property include loss of stock ponds, a gravel pit, gravel deposit, and fences.

355. Although brought as a part of her claim, Karin Konzak testified and it is found that the property described as the Southwest Quarter of Section 32, Township 154 North, Range 65 West, and Lot 2 and Lot 3 in Section 5 have suffered no flooding damage. So, this part of plaintiff's claim is to be dismissed and it will be so ordered.

356. Plaintiff, **Blake Aasmundstad** resides at 4918 - 73<sup>rd</sup> Avenue NE, Devils Lake, ND 58301.

357. Plaintiff, Blake Aasmundstad owns property near or adjacent to Devils Lake, legally described as:

**Plaintiffs' Exhibit 464**

County of Pierce and State of North Dakota:

Lots One (1) and Two (2) of Section Twenty-seven (27); the Northeast quarter (NE1/4), the North half of the Southeast quarter (N1/2SE1/4), the Southeast quarter of the Southeast quarter (SE1/4SE1/4) and Lots Three (3), Four (4) and Five (5) of Section Twenty-two (22); the Southwest quarter (SW1/4) of Section Twenty-three (23); all in Township One Hundred Fifty-four (154) North, Range Sixty-six (66) West, Ramsey County, North Dakota, subject to easements, reservations and right-of-ways of record.

EXCEPTING a tract of land situated in the SE1/4 of Section 22, Township 154 North, Range 66 West, being more particularly described as follows: beginning at a point on the east line of said Section 22, said point being located 492.22 feet North of the SE section corner; thence North 74°54'10" West a distance of 710.71 feet; thence North 0°39'24" West a distance of 1962.71 feet; thence South 88°39'16" East a distance of 390.52 feet; thence South 10°50'05" West a distance of 441.09 feet; thence South 0°38'05" West a distance of 627.36 feet; thence South 34°30'15" East a distance of 187.10 feet; thence South 4°45'32" East a distance of 312.67 feet; thence South 80°25'33" East a distance of 280.09 feet to a point on the east line of said Section 22; thence South 0°0'00" West along said section line a distance of 565.60 feet to the point of beginning. Said tract of land contains 19.9 acres, more or less, and is subject to a 33' public easement along the section line.

**Plaintiffs' Exhibit 467**

A tract of land situated in the SE 1/4 of Section 22, Township 154N, Range 66W being more particularly described as follows: Beginning at a point on the east line of said Section 22, Said point being located 492.22 feet North of the SE section corner; thence North 74 Degrees 54' 10" West a distance of 710.71 feet; thence N 0 Degrees 29' 24" West a distance of 1962.71 feet; thence South 88 degrees 29' 16" East a distance of 390.52 feet; thence South 10 degrees 50' 05" West a distance of 441.09 feet; thence South 0 degrees 38'05" West a distance of 627.36 feet; thence South 34 degrees 30' 15"E distance 187.10 feet thence South 4 degrees 45' 32" East a distance of 312.67 feet; thence South 80 degrees 25' 33" East a distance of 280.09 feet to a point on the east side of said Section 22; thence South 0 degrees 0' 0" West along said section line a distance of 565.60 feet to the point of beginning. Said tract of land contains 19.9 acres more or less and is subject to a 33' public easement along the section line, County of Ramsey, State of North Dakota

358. Blake Aasmundstad's property at Lot 4 of Section 22, totals 15.55 acres. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in June of 1994, with continued gradual flooding through June of 1996. It is now completely flooded. So, it had a low elevation range of about 1429.86 feet to 1430.57

1 feet. Its high elevation was not greater than 1437.75 feet. This trial court is more persuaded  
2 that the low elevation of this property is to be determined from testimony relating to the  
3 time of initial flooding than to the affidavit referenced to in his cross examination where he  
4 states his property is greater than 1426 feet in elevation. Additional damages to this  
5 property include loss of fencing.

6 359. Blake Aasmundstad's property at Lot 5 of Section 22, totals 39.7 acres. It is completely  
7 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
8 started to flood in May or June of 1994, with continued gradual flooding through June of  
9 1996. So, the low elevation range of the property is about 1429.28 feet to 1430.57 feet. The  
10 high elevation was not greater than 1437.75 feet.

11 360. Blake Aasmundstad's property at all the remaining East half of Section 22 is completely  
12 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
13 started to flood in June of 1994, with continued gradual flooding through June of 1997 when  
14 it became completely flooded. So, it has a low elevation range of about 1429.86 feet to  
15 1430.57 feet. The high elevation of the property was not greater than 1442.32 feet.  
16 Additional damages at all the remaining East half of Section 22 include loss of fencing.

17 361. Blake Aasmundstad's property at Lot 1, Section 27, totals 33.61 acres. It is completely  
18 flooded and/or otherwise damaged by the Devils Lake floodwaters. There is only a small  
19 crescent shaped ridge sticking an inch or so out of the water. This property initially started  
20 to flood in June of 1994, with continued gradual flooding through June of 1996. So, it has a  
21 low elevation range of about 1429.86 feet to 1430.57 feet. The high elevation of the bulk of  
22 the property actually flooded was not greater than 1437.75 feet. Additional damages to this  
23 property includes loss of a well, and trees.

24 362. Blake Aasmundstad's property at Lot 2 of Section 27, 32.82 totals acres. It is completely  
25 flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially  
26 started to flood in June of 1994, with continued gradual flooding through June of 1996 when  
27 it became completely flooded. So, the property had a low elevation range of about 1429.86  
28 feet to 1430.57 feet. Its high elevation was not greater than 1437.75 feet.

29 363. Blake Aasmundstad's property at the Southwest Quarter of Section 23, totals 164 acres. Of  
30 this acreage 137 acres are accessible and not damaged but the remaining 27 acres are wet  
31 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
32 flood in June of 1997, with continued gradual flooding through August of 2006. So, the low  
33 elevation range of the property is about 1442.06 feet to 1442.32 feet. The high elevation of  
34 the flooded land is not greater than 1449.2 feet. Additional damages to this property have

1 not been proven as to the acreage not flooded. This court finds that plaintiff's claim that  
2 when the cattails die off he expects to lose the road so that the rest of his land would be  
3 inaccessible is too speculative and conclusory to support a finding that there is also damage  
4 to the dry acreage.

5 364. Danny Foss, as attorney-in-fact, testified for plaintiff **Genevieve Foss**. Danny Foss resides  
6 at 6961 Highway 19 West, Devils Lake, ND 58301. By his testimony Danny Foss  
7 established personal knowledge of this plaintiff's property.

8 365. Plaintiff, Genevieve Foss owns property near or adjacent to Devils Lake, in the County of  
9 Benson, State of North Dakota, legally described as:

10 **Plaintiffs' Exhibit 933**

11 The Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) and Lots  
12 Three (3) and Four (4) of Section Twenty-seven (27); Lots One (1) and Two  
13 (2) of Section Twenty-eight (28) and the East Half of the Northwest Quarter  
14 (E1/2NW1/4), The Northeast Quarter of the Southwest Quarter  
15 (NE1/4SW1/4) and Lots Five (5) and Six (6) of Section Thirty-four (34) all in  
16 Township One Hundred Fifty-four (154) North of Range Sixty-six (66) West  
of the Fifth Principal Meridian, less that portion heretofore deeded for  
highway right-of-way purposes.

17 **Plaintiffs' Exhibit 932**

18 Southeast Quarter (SE 1/4) of Section Twenty-eight (28); The East Half of the  
19 Northeast Quarter (E 1/2 NE 1/4) of Section Thirty-three (33); and the West Half  
20 of the Northwest Quarter (W2 NW 1/4) of Section Thirty-four (34) all in  
21 Township One Hundred Fifty -four North of Range Sixty-six West, subject to  
22 highway conveyances and the grantor reserves one-half of all oil, gas and  
mineral interests for a period of ten years from the date hereof.

23 **Plaintiffs' Exhibit 645**

24 The Southeast Quarter (SE1/4) of Section Twenty-eight (28); the East Half of  
25 the Northeast Quarter (E1/2NE1/4) of Section Thirty-three (33); and the West  
26 Half of the Northwest Quarter (W1/2NW1/4) of Section Thirty-four (34); all  
27 in Township One Hundred Fifty-four (154) North of Range Sixty-six (66)  
West, Benson County, North Dakota, subject to all rights and reservations of  
record.

28 **Plaintiffs' Exhibit 643**

29 **Power of Attorney**

30 366. Genevieve Foss' property at Lots 1 and 2 in the South half of the Northeast Quarter, totals  
31 80 acres. Of this acreage, 40 acres at the Southwest of the Northeast Quarter of Section 1 is  
32 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
33 property initially started to flood in May of 1994, with continued gradual flooding through  
34 August of 2006. So, it had a low elevation range of about 1429.28 feet to 1429.93 feet. The

- highest elevation of the acreage actually flooded was not greater than 1449.2 feet. Additional damages to this property include reduced rental value to the remaining acres.
367. Genevieve Foss' property at Lot 3 of Section 27, totals 27.10 acres. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1994, with continued gradual flooding through June of 1997. It is not all flooded. So, the property had a low elevation range of about 1429.28 feet to 1429.93 feet. Its high elevation was not greater than 1442.32 feet. Additional damages to this property include loss of fencing.
368. Genevieve Foss' property at Lot 4 of Section 27, totals 30.30 acres. It is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1994, with continued gradual flooding through June of 1997, when it became all flooded. So, the property had a low elevation range of about 1429.28 feet to 1429.93 feet. Its high elevation was not greater than 1442.32 feet. Additional damages to this property include loss of fencing.
369. Genevieve Foss' property at the Southwest Quarter of the Southwest Quarter of Section 27 is completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1994, with continued gradual flooding through June of 1997 when it became all flooded. So, it had a low elevation range of about 1429.28 feet to 1429.93 feet. The high elevation of the property was not greater than 1442.32 feet. Additional damages to this property include loss of fencing.
370. Genevieve Foss' property at Lot 5 of Section 34, totals 40.50 acres. Of this acreage, approximately 30 acres are flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1996, with continued gradual flooding through June of 1997. So, the low elevation range of the property was about 1437.44 feet to 1437.75 feet. Its high elevation of almost all of the flooded acreage was not greater than 1442.32 feet. Additional damages to this property include loss of shelter belts and fencing.
371. Genevieve Foss' property at Lot 6 of Section 34, totals 30.80 acres. Of this acreage, approximately 25 acres are flooded and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to flood in May of 1996, with continued gradual flooding through June of 1997. So, the low elevation range of the property is about 1437.44 feet to 1437.75 feet. Its high elevation of almost all of the flooded acreage was not greater than 1443.32 feet. Additional damages to this property include loss of a grainery, trees, and fences.

- 1 372. Genevieve Foss' property at the East half of the Northwest Quarter of Section 34 is partially  
2 damaged. Of the total acreage approximately 40 acres are flooded and/or otherwise  
3 damaged by the Devils Lake floodwaters. This property initially started to flood in May of  
4 1994, with continued gradual flooding through June of 1997. So, the low elevation range of  
5 the property is about 1429.28 feet to 1429.93 feet. Its high elevation for almost all of the  
6 flooded acreage is not greater than 1442.32 feet, but none of it is greater than 1449.2 feet.  
7 Additional damages to this property include loss of fencing.
- 8 373. Genevieve Foss' property at the West half of the Northwest Quarter of Section 34, totals 80  
9 acres. This property initially started to flood in May of 1995, with continued gradual  
10 flooding through June of 1997 when it became completely flooded. So, the low elevation  
11 range of this property was about 1433.83 feet to 1435.26 feet. Its high elevation was not  
12 greater than 1442.32 feet. Additional damages to this property include loss of fencing.
- 13 374. Genevieve Foss' property at the East half of the Northeast Quarter of Section 33 is  
14 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
15 property initially started to flood in May of 1995, with continued gradual flooding through  
16 May of 1997, when it became completely flooded. So, the low elevation range of this  
17 property was about 1433.83 feet to 1435.26 feet. Its high elevation was not greater than  
18 1442.03 feet. Additional damages to this property includes loss of fencing.
- 19 375. Genevieve Foss' property at the Northeast Quarter of the Southwest Quarter of Section 34,  
20 40 totals acres. Of this, approximately 2 acres are flooded and/or otherwise damaged by  
21 Devils Lake floodwaters. This property initially started to flood in May of 2004, with  
22 gradual continuous flooding. So, the low elevation range of this property was about 1448.23  
23 feet to 1448.81 feet. Its high elevation for the flooded acreage was not greater than 1449.2  
24 feet.
- 25 376. Genevieve Foss' property at the Southeast Quarter of Section 28 is completely flooded  
26 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
27 flood in May of 1994, with continued gradual flooding through May of 1996 when it  
28 became completely flooded. So, the low elevation range of this property was about 1429.28  
29 feet to 1429.93 feet. Its high elevation was not greater than 1437.37 feet. Additional  
30 damages to this property include loss of fencing.
- 31 377. Genevieve Foss' property at Lot 1 of Section 28, totals 14 acres. It is completely flooded  
32 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
33 flood in May of 1994, with continued gradual flooding through May of 1996 when it  
34 became completely flooded. So, the low elevation range of the property is about 1429.28

1 feet to 1429.93 feet. Its high elevation was not greater than 1437.37 feet. Additional  
2 damages to this property include loss of fencing.

3 378. Genevieve Foss' property at Lot 2 of Section 28, totals 29.60 acres. It is completely flooded  
4 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
5 flood in May of 1994, with continued gradual flooding through May of 1996 when it  
6 became completely flooded. So, the low elevation range of this property was about 1429.28  
7 feet to 1429.93 feet. The high elevation of it was not greater than 1437.37 feet. Additional  
8 damages to this property include loss of fencing.

9 379. Plaintiffs, **Reginal K. and Eileen Herman** reside at 5475 – 62<sup>nd</sup> Avenue NE, Brinsmade,  
10 ND 58351.

11 380. Plaintiffs, Reginal K. and Eileen Herman own property near or adjacent to Devils Lake,  
12 legally described as:

13 **Plaintiffs' Exhibit 924**

14 E1/2SE1/4 of Section 31; SW1/4 of Section 32; S1/2NW1/4 of Section 32; all  
15 in Township 154 North of Range 66 West; Lots 1, 5, 6 and 7 in Section 6; and  
16 Lots 3 and 4 in Section 5; all in Township 153 North of Range 66 West; Lot  
17 12 in Section 1, Township 153 North of Range 67 West; and Lot 1 in Section  
18 12, Township 153 North of Range 67 West; all of said property in Benson  
County, North Dakota.

19 **Plaintiffs' Exhibit 921**

20 County of Benson, and the State of North Dakota, viz:  
21 W1/2 4-153-66 Property consists of 260.5 tillable acres.

22 **Plaintiffs' Exhibit 920**

23 N1/2NW1/4 and E1/2SE1/4NW1/4 of Section 33; W1/2NE1/4 of Section 29;  
24 and the East 800 feet of NE1/4NE1/4 of Section 32, all of said property in  
25 Township 155 North of Range 67 West in Benson County, North Dakota.

26 **Plaintiffs' Exhibit 925**

27 SE1/4 SW1/4 and S1/2N1/2SW1/4 of Section 4, Township 153 North of  
28 Range 66 West in Benson County, North Dakota.

29 **Plaintiffs' Exhibit 926**

30 Lots 3 and 4, S1/2NW1/4, E1/2SW1/4, and NW1/4SW1/4 of Section 4,  
31 Township 153 North of Range 66 West in Benson County, North Dakota.

32 Some of the above described property is impacted by a partnership agreement represented  
33 in Plaintiffs' Exhibit 931. Article III of that partnership agreement sets out in certain  
34 property contributed to the partnership. It states:

**Plaintiffs' Exhibit 931**

Each of the partners owns and has contributed 50 percent of the total  
contributions of the partnership. The partnership owns farm land in Benson  
County, North Dakota more particularly described as the West Half of the  
Northeast Quarter (W1/2/NE1/4) of Section Twenty-nine (29); and an

1 additional tract containing approximately 100 acres north of the Little Coulee  
2 in the Northwest Quarter (NW1/4) of Section Thirty-three (33); and a building  
3 site including the buildings located thereon in the Northeast Quarter of the  
4 Northeast Quarter (NE1/4NE1/4) of Section Thirty-two (32); all in Township  
5 One Hundred Fifty-five North (155N), Range Sixty-seven West (67W) in  
6 Benson County, North Dakota.

7 381. Reginal K. and Eileen Herman brought their claims against the defendants in their own  
8 name and not as partners in any other entity. (See Paragraph 96 of the First Amended  
9 Complaint). The defendant water resource districts (except Ramey County Water Resource  
10 District) assert that much of the property for which these plaintiff's bring their claim are not  
11 owned by them but by Hermansdale Farms.

12 This court finds that the property claimed to be owned by these plaintiffs and described in  
13 Plaintiffs' Exhibits 920, 925 and 926 (which is also the same property contained in  
14 Plaintiffs' Exhibit 921) are in fact properties owned by a partnership known as Hermansdale  
15 Farms. Plaintiffs' Exhibit Number 931 which was received into evidence is the Articles of  
16 Partnership for Hermansdale Farm. By the terms of those Articles of Partnership, the  
17 plaintiff, Reginal K. Herman is a partner in this partnership. The remaining and only other  
18 partner is Duane Herman, his father. Each of these two partners received fifty percent of the  
19 partnership interest which would include any real property owned by the partnership.

20 382. Even though Hermansdale Farm, the partnership, was not a named party in this action,  
21 Reginal K. Herman is entitled to bring a claim for whatever equitable interests he has in the  
22 partnership property previously described. The property was described in the amended  
23 complaint. So, there is no surprise to the defendants. Clearly, Reginal Herman has an  
24 interest in fifty percent of this property. The evidence supports the finding that the above  
25 described property in the three parcels is partnership property. Even though defendant's  
26 counsel correctly cites N.D.C.C. 45-14-03 that, "*property acquired by a partnership is  
27 property of the partnership and not of the partners individually*", the ownership interest that  
28 Reginal Herman has in the partnership itself is sufficient to allow him to proceed in this  
29 action as a party. Alternatively, to the extent that he does not constitute the real party in  
30 interest as to this particular property, then pursuant to Rule 17, N.D.R.Civ.P. it is  
31 appropriate to allow this plaintiff if he desires to move for substitution of party under that  
32 rule as to this particular property. The rule authorizes such a motion to be done at trial or  
33 post trial.

34 383. Reginal K. and Eileen Herman's property at the North Half of the Northwest Quarter and the  
Southeast Quarter of the Northwest Quarter of Section 33 totals approximately 100 acres.  
The plaintiff offered no testimony as to when this land suffered any degree of flooding, nor

1 did this plaintiff offer any evidence as to the specific elevations of the property. Therefore,  
2 it is impossible for this court to determine either by way of actual evidence of elevation  
3 levels or reasonable inferences based upon that when any property began to flood. Further,  
4 there is no evidence as to what kind of acreage, if any became flooded. Essentially, the  
5 plaintiff's argument is that the Little Coulee flows through his property from Lake Ibsen  
6 which is 8 miles upstream. The water then eventually dumps in to Devils Lake. He asserts  
7 that because of the increased floodwaters of Devils Lake, the water in the coulee does not  
8 move through as quickly as it did in the past and that it also spreads out to some degree over  
9 the banks of the coulee.

10 Further, the plaintiff also testified that he has been subject to periodic flooding in the past by  
11 this action. Further, he did not testify to what extent this flooding over the banks of the  
12 Little Coulee occurred as to the number of acres or how long the water stood on this  
13 acreage.

14 384. Based upon the above this court cannot find that the plaintiff has proven sufficient damages  
15 as to this property on the North Half of the Northwest Quarter and the Southeast Quarter of  
16 the Northwest Quarter of Section 33 to find he has suffered damages due to the rising  
17 floodwaters of Devils Lake. Therefore, this plaintiff's claim as to this parcel of property  
18 will be dismissed and it will be so Ordered.

19 385. Reginal K. and Eileen Herman have property at the Northeast Quarter of the Northeast  
20 Quarter of Section 32. The plaintiff claims that this property has also been damaged due to  
21 the Devils Lake floodwaters for the same reasons claimed as to Section 33. Again, the  
22 defendant has offered no testimony as to when these runoff problems began. Consequently,  
23 it is impossible to calculate by that information a low elevation range of his property that  
24 has been flooded. No actual testimony of elevation levels have been given. Therefore, in  
25 light of this and the inadequate description as to the number of acres supposedly harmed,  
26 and for the duration of that harm before it runs back into the coulee, this plaintiff has failed  
27 to establish his damages. Therefore, this part of the plaintiff's claim shall be dismissed and  
28 it is so Ordered.

29 386. Reginal K. and Eileen Herman's property at Lot 1 of Section 12, totals 60.9 acres. It is  
30 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
31 property initially started to flood and became completely inundated in May or June of 1995.  
32 So, it had an elevation range of about 1433.83 feet to 1435.74 feet. Additional damages to  
33 this property include loss of fencing.  
34

- 1 387. Reginal K. and Eileen Herman's property at Lot 12 of Section 1, totals 22.7 acres. It is  
2 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
3 property initially started to flood and became completely inundated in May or June of 1995.  
4 So, the elevation range of the property was about 1433.83 feet to 1435.74 feet. Additional  
5 damages to this property include loss of fencing.
- 6 388. Reginal K. and Eileen Herman's property at the East half of the Southeast Quarter of  
7 Section 31, totals 80 acres. Of this acreage, approximately 50 acres are flooded and/or  
8 otherwise damaged by the Devils Lake floodwaters. This property initially started to flood  
9 in May or June of 1995, with continued gradual flooding through June of 1997. so, the low  
10 elevation range of this property was about 1433.83 feet to 1435.69 feet. Its high elevation  
11 was not greater than 1442.32 feet for the land actually flooded. Additional damages to this  
12 property include loss of fencing.
- 13 389. Reginal K. and Eileen Herman's property at the Southwest Quarter of Section 32 is partial  
14 damaged. In this parcel approximately 20 acres are under water and/or otherwise damaged  
15 by the Devils Lake floodwaters. The remaining acreage is not damaged. This property  
16 initially started to flood in May or June of 1998 with flooding gradually increasing with the  
17 rising lake levels of Devils Lake. So, the low elevation range of the property is about  
18 1444.27 feet to 1444.62 feet. Its high elevation for the land actually flooded is not greater  
19 than 1449.2 feet. Additional damages to this property include loss of fencing.
- 20 390. Reginal K. and Eileen Herman's property at the South half of the Northwest Quarter of  
21 Section 32, totals 80 acres. Of this acreage approximately 18 acres are flooded and/or  
22 otherwise damaged by the Devils Lake floodwaters. Up to ten acres are actually flooded and  
23 eight acres unusable due to saturation. This property initially started to flood in late Spring  
24 or early Summer of 2001, with gradual continuous, ongoing flooding. So, this property had  
25 a low elevation range of about 1446.51 feet to 1447.87 feet. Its high elevation for the land  
26 actually flooded is not greater than 1449.2 feet. Additional damages to this property include  
27 loss of fencing.
- 28 391. Reginal K. and Eileen Herman's property at Lot 1 of Section 6, totals 41.2 acres. It is  
29 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
30 property initially started to flood and became completely inundated in May or June of 1995.  
31 So, it had an elevation range of about 1433.83 feet to 1435.74 feet. Additional damages to  
32 this property include loss of fencing.
- 33 392. Reginal K. and Eileen Herman's property at Lot 5 of Section 6, totals 35.7 acres. It is  
34 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This

- 1 property initially started to flood and became completely inundated in May or June of 1995.  
2 so, it had an elevation range of about 1433.83 feet to 1435.74 feet. Additional damages to  
3 this property include loss of fencing and stock pond.
- 4 393. Reginal K. and Eileen Herman's property at Lot 6 of Section 6, totals 38.3 acres. It is  
5 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
6 property initially started to flood and became completely inundated in May or June of 1995.  
7 So, it had an elevation range of about 1433.83 feet to 1435.74 feet. Additional damages to  
8 this property include loss of fencing.
- 9 394. Reginal K. and Eileen Herman's property at Lot 7 of Section 6, totals 25.3 acres. It is  
10 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
11 property initially started to flood and became completely inundated in May or June of 1995.  
12 So, its elevation range was about 1433.83 feet to 1435.74 feet. Additional damages to this  
13 property includes loss of fencing.
- 14 395. Reginal K. and Eileen Herman's property at Lot 3 of Section 5 is less than 32.3 acres. It is  
15 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
16 property initially started to flood and became completely inundated in May or June of 1995.  
17 So, it had an elevation range of 1433.83 feet to 1435.74 feet. Additional damages to this  
18 property include loss of fencing.
- 19 396. Reginal K. and Eileen Herman's property at Lot 4 of Section 5, totals 28.54 acres. It is  
20 completely flooded and/or otherwise damaged by the Devils Lake floodwaters. This  
21 property initially started to flood and became completely inundated in May or June of 1995.  
22 So, it had an elevation range of about 1433.83 feet to 1435.74 feet. Additional damages to  
23 this property include loss of fencing.
- 24 397. Reginal K. and Eileen Herman's property at the South half of the Northwest Quarter of  
25 Section 4 is partially damaged. Of the total acreage, approximately 15 acres are flooded  
26 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
27 flood in May or June of 2004, with continuous gradual ongoing flooding. So, the property  
28 had a low elevation range of 1448.23 feet to 1448.96 feet. The land actually flooded has an  
29 elevation not greater than 1449.2 feet.
- 30 398. Reginal K. and Eileen Herman's property at the Southwest Quarter (which is the Northwest  
31 Quarter, the Northeast Quarter, the Southeast Quarter and the Southwest Quarter) of Section  
32 4 consisting of three 40 acre parcels, are completely flooded and/or otherwise damaged by  
33 the Devils Lake floodwaters. Most of the land is flooded (80%). The parts that are not  
34 flooded are now in growth with cattails or reeds with some trees. None of it is farmable for

1 crops or pasture. 10% is above water and woodland usable at best for hunting. This  
2 property initially started to flood in May or June of 1995, flooding continued gradually with  
3 the rising lake levels of Devils Lake. So, the low elevation range of the property was about  
4 1433.83 feet to 1435.74 feet. The land actually flooded has an elevation not greater than  
5 1449.2 feet. Additional damages to this property include loss of fencing.

6 399. Plaintiffs, Reginal K. and Eileen Herman's property at the East half of Section 4 (except the  
7 East half of the Northeast Quarter, 80 acres) of Section 4 is partially damaged. Of the total  
8 acreage about 30 acres are under water and/or otherwise damaged by the Devils Lake  
9 floodwaters. This property initially started to flood in May or June of 1995, and flooding  
10 continuously gradually increased with the rising lake levels of Devils Lake. So, the low  
11 elevation range of this property is about 1433.83 feet to 1435.74 feet. The high elevation of  
12 the land actually flooded is not greater than 1449.2 feet.

13 400. Plaintiff, **Jan Shelver** resides at 318 Shelver Place, Devils Lake, ND 58301.

14 401. Plaintiff, Jan Shelver at one time owned property near or adjacent to Devils Lake, in  
15 Ramsey County, State of North Dakota, legally described as:

16 **Plaintiffs' Exhibit 700**

17 All that property lying on the West Side of Highway US #2 in the Northeast  
18 Quarter (NE1/4) of Section 18, Township 153 N. of Range 63/W. All of Govt.  
19 Lot #4, less tracts previously Deeded in Section 18, Twp. 153 N, of Rg. 63W.  
20 Atll That property lying on the West Side of Highway US #2 in the Northeast  
21 Quarters of the Southeast quarter (NE1/4SE1/4) of Section 18, Twp. 153 N. of  
22 Rg. 63 West, less tracts previously deeded.

23 **Plaintiffs' Exhibit 701**

24 LOTS THREE (3) AND FOUR (4), LYING SOUTHWEST OF SECTION  
25 EIGHTEEN (18), TOWNSHIP 153 NORTH, RANGE 63 WEST, US  
26 HIGHWAY 2, LESS 2.88 ACRES, RAMSEY COUNTY, NORTH  
27 DAKOTA.

28 **Plaintiffs' Exhibit 702**

29 Lots Three (3) and Four (4), lying Southwest of Section Eighteen (18),  
30 Township 153 North, Range 63 West, US Highway 2, less 2.88 acres.

31 402. From a review of this plaintiff's testimony it is difficult to determine how much of the  
32 property described above she still owned at the time she initiated her claim. Plaintiffs'  
33 Exhibit 702 is Quit Claim Deed from her to herself in 2001. Plaintiffs' Exhibit 701 is  
34 another Quit Claim Deed from her to herself in 1999. On the other hand, Plaintiffs' Exhibit  
700 is a Warranty Deed from her and her husband to herself in 1983. It is not evident from  
a review of either the testimony or of these three exhibits whether they constitute some or  
part of the very same property. In any event, she did testify that Plaintiffs' Exhibit 700  
involved much more than the 15 acres that she ultimately possessed at a future time.

1 Ultimately the plaintiff ended up with 15 acres surrounding her farmstead. This became  
2 flooded. The additional confusion comes from her testimony that some of her property (and  
3 this court presumes that means the 15 acres) is under 25 feet of water. If that is the case,  
4 some of this 15 acres would have been flooded when the water level was at about 1424 feet.  
5 This would have been at some point between 1989 and 1990. So, when she testifies that her  
6 land began to flood in 1998, this court must find from all of the evidence presented that she  
7 is referring to the 5.9 acres and nothing more than that.

8 Limiting her claim to the 5.9 acres which she now has testified is also partially flooded,  
9 leaving only 2 dry acres, this places her claim well within the statute of limitations. To the  
10 extent the defendants assert as to these 5.9 acres that this plaintiff's claim is beyond the  
11 statute of limitations, they have failed to establish that by a preponderance of the evidence.

12 403. The plaintiff Jan Shelver has sold portions of this property over time so that she now owns  
13 5.9 acres for which she has submitted a claim. All except approximately 2 acres, is flooded  
14 and/or otherwise damaged by the Devils Lake floodwaters. This property initially started to  
15 flood in April or May of 1998, with ongoing continuous gradual flooding. So, the low  
16 elevation range of her 5.9 acre parcel was about 1443.09 feet to 1444.56 feet. The high  
17 elevation of the portion flooded is not greater than 1449.2 feet. Additional damages include  
18 loss of sewer, corral, barn, landscaping and the cost of moving the house, less compensation  
19 from other sources.

20 404. Plaintiff, **James P. Wang** resides at 4377 – 73<sup>rd</sup> Avenue NE, Devils Lake, ND 58301.

21 405. Plaintiff, James P. Wang owns property near or adjacent to Devils Lake, legally described  
22 as:

23 **Plaintiffs' Exhibit 930**

24 parcel situated in Government Lots Three (3) and Four (4), Section Twenty-  
25 six (26), Township One Hundred Fifty-three (153), Range Sixty-six (66) and  
26 further described as follows: Starting at the Northeast (NE) corner of Section  
27 Twenty-three (23), Township One Hundred Fifty-three (153), Range Sixty-six  
28 (66), thence South 5,927.0 feet to the point of beginning, thence South 581.0  
feet, thence West 1,360.0 feet, thence North 581.0 feet, thence East 1,360.0  
feet to the said point of beginning; consisting of 18.3 acres more or less.

29 406. James P. Wang's property is located on Grahams Island. This plaintiff testified that none of  
30 his property has been flooded or otherwise directly impacted or damaged by Devils Lake.  
31 His claim instead arises out of limited and temporary access he had to the property for a  
32 period of time.

33 At the time he located his residence on Grahams Island this plaintiff was able to access it by  
34 two roads-an east/west road on Minnewaukan Flats and a north/south road connecting the

1 island to Highway 19. He typically would use the Minnewaukan Flats road to travel to and  
2 from his residence. This roadway went under water in the spring of 1995 or 1996. He also  
3 testified that in 1997 the road connecting Highway 19 was rebuilt and raised. From April  
4 23, 1997 until Labor Day on September 5, 1997 this road was unusable because it was being  
5 rebuilt. Therefore, during these four months this plaintiff was able to access his residence  
6 and Grahams Island only by motorboat. Currently, the only road accessing his property on  
7 Grahams Island is the north/south road from Highway 19. Consequently, he has complete  
8 and unlimited access to his property.

9 407. This temporary limitation on this plaintiff's access to his property did not constitute a taking  
10 of his property or otherwise constitute damage to it. Except for a brief period of time of  
11 approximately four months he always had access by at least one roadway to his property.  
12 The period of time that he had no access by roadway to his property he was able to access it  
13 by motorboat. This limited and short restriction on his access was not unreasonable.  
14 Requiring him to use a motorboat for short period of time to the island was a reasonable  
15 means of access and did not substantially interfere with his ingress or egress. He now has  
16 complete and reasonable access both by boat and roadway to his property.

17 408. Based upon the above this court finds that even if the Devils Lake floodwaters caused the  
18 limited and temporary access he had to his property as described above, it did not constitute  
19 any form of taking or damages for which he may recover compensation. Consequently, this  
20 claim is to be dismissed and it shall be so Ordered.

21 409. Plaintiff's **Roger and Constance Haugen** submitted a claim in the complaint for damages  
22 to certain property. At the trial Roger Haugen testified that the property he submitted was  
23 not damaged and a different lot that he owned was damaged. He withdrew his original  
24 property claim and moved to amend the complaint to allow for this new property. That was  
25 denied. Consequently, his original claim shall be dismissed and it shall be so Ordered.

26 410. This trial court finds that the best evidence for determining the elevations of the properties  
27 of the plaintiffs was by taking into account the history of the flooding of each parcel of  
28 property derived from the testimony of the different plaintiffs through examination and cross  
29 examination. All of this property was adjacent to Devils Lake or became adjacent to Devils  
30 Lake as the lake elevation climbed. Consequently, by taking the testimony of each of the  
31 plaintiffs or those testifying for the plaintiffs, this court was able to take that testimony and  
32 from the time the land began to flood and time it became completely flooded, apply that  
33 towards the lake elevations of Devils Lake as contained in Plaintiffs' Exhibit 511. So for  
34 example, if the finding was that land began to flood in May of 1995, that meant it had a low

1 elevation range of 1433.83 feet to 1435.26 feet. If the land became completely flooded in  
2 May of 1997 by referring to Plaintiffs' Exhibit 511, it can be reasonably determined that the  
3 property had an elevation not greater than 1442.03 feet.

4 Not all of the parcels became completely flooded. Under those circumstances this court  
5 either determined that the land that was actually flooded had an elevation not greater than  
6 1449.2 feet based upon Plaintiffs' Exhibit 511 or alternatively if the court determined a  
7 lower high elevation, it was based upon the determination that the bulk of the land became  
8 flooded by a certain date so that the vast majority of the flooded land had a high elevation of  
9 a different level. This court recognizes that the sloping nature of the property and the  
10 history of the lake flooding would result in some degree of constant encroachment. In any  
11 event, this court finds that none of the property determined to have been actually flooded at  
12 the time of trial had an elevation greater than 1449.2 feet.

13 There may have been a few parcels of property that were so far inland that are now flooded  
14 that this methodology used by the court may be subject to dispute by the defendant, although  
15 almost all of the property described by these plaintiffs were adjacent to the lake at some  
16 point as the elevations climbed. To the extent that a few parcels were not and that these  
17 elevation calculations are inaccurate so that they would be lower than determined by the  
18 court, it would still trace the flooding to the increased elevations of the lake. The ordinary  
19 high water mark of Devils Lake is 1426 feet msl. See Matter of Ownership of Bed of Devils  
20 Lake 423 N.W. 2d 141, 145 (N.D. 1988). Even if it is asserted that there is likelihood that  
21 certain inland properties of the plaintiffs could be lower than 1426 feet, these plaintiffs  
22 testified that their properties were inundated by the waters of Devils Lake. That means that  
23 even at a lower elevation below 1426 feet, these lands would have been protected from the  
24 lake by the topography of the land surrounding it. It also means that to the extent that the  
25 topography did protect the land, the elevated land surrounding it would have been less than  
26 1449.2 feet because it was the waters of Devils Lake that ultimately flooded these plaintiff's  
27 land at some point in time as the lake expanded in its size and elevation.

28 Finally, to the extent that defendants claim that this method is inadequate to establish  
29 elevations for the properties, this court disagrees. It was a reasonable basis to apply their  
30 testimony and the findings made related to when their properties became flooded against the  
31 Devils Lake elevation levels contained in Plaintiffs' Exhibit 511. It may not have been the  
32 best evidence, but it was evidence that allowed for reasonable calculations and findings. If  
33 the defendants believe that the actual surveyed elevation readings of the property would  
34

1 have given a more accurate determination of elevations, they could have presented such  
2 evidence. They declined to do so.

3 411. The legal descriptions included in the different findings related to each of the plaintiffs were  
4 in many cases redundant and extensive and at times offering different legal descriptions to  
5 the same property or different interests in them. To the extent that these descriptions  
6 include property not identified in the plaintiffs' amended complaint or allowed by motion to  
7 amend during the trial, it was not the intent of this court to allow for additional properties to  
8 be a part of any claim. It should instead be considered merely surplus description.

9 412. To the extent that it may not be clear from the previous findings made, this court is satisfied  
10 from all of the evidence presented by the testimony of the different plaintiffs that the  
11 properties they have described which are part of their claims which were actually flooded  
12 were at an elevation not greater than 1449.2 feet.

13 413. The damages described for the properties set out above through the different claims are  
14 limited to that described in these findings. Some of those damages may be more appropriate  
15 to include as a manner of measuring the value of the actual real property. Consequently, it  
16 should not be suggested by any of the parties that these findings constitute a basis for the  
17 measurement of damages which are more appropriately reserved for stage two of the trial in  
18 the event that occurs. Further, any damages claimed or otherwise awarded at any stage two  
19 proceeding may be subject to set off against monies received from other sources.

20 414. Elevations of the water bodies found by this court in subsequent findings were based on a  
21 review of all of the evidence. In making these findings it is recognized by this court that the  
22 highest elevation of a water body contained in the evidence was not always the correct  
23 natural outlet elevation. This is because the dynamics of water flow relating to these water  
24 bodies, the location of elevation readings, and when readings were taken may impact  
25 elevation. Downstream channel capacity, but especially outlet flow capacity and rate of  
26 inflow compared to the rate of outflow all have demonstratively shown from the evidence  
27 that water elevation can be impacted by these factors. The typical result is a higher  
28 elevation. For example, State Engineer Dale Frink, testified Lake Alice has reached an  
29 elevation as high as 1447 feet in the past before discharging out to a level consistent with  
30 the outlet control. Readings near the inflow source may result in higher readings than at the  
31 outflow point especially in spring or after heavy rains when there is likely more water  
32 volume. All of this contributes to the "bounce" effect described by Cecelio Olivier in his  
33 testimony.

1 In addition, choke points within the water body can impact elevation. This is especially true  
2 in Devils Lake itself. Much of the inflow of water into Devils Lake occurs in West Bay.  
3 There is a choke point as the water from West Bay enters into the main part of Devils Lake  
4 south of Six Mile Bay. A significant flow of water also enters the lake from Six Mile Bay,  
5 Channel A. There are choke points before the water can enter into East Bay. This is where  
6 North Dakota Highway 57 passes over the lake. There is another before the water enters  
7 east Devils Lake. All of these choke points including those in channels such as culverts  
8 under roadways inhibit the rapid leveling of the water west to east on Devils Lake and  
9 inhibit water flow on water channels thereby creating backup. So, at any given time the  
10 elevation of one part of the lake may likely be lower than another location west or north on  
11 the lake and will also impact channel and upper lake elevations.

12 415 Beginning even before the 1950's the defendant water resource districts and the State Water  
13 Commission and State Engineer or their predecessors became involved in different water  
14 projects to address concerns of land owners in the Devils Lake Basin, particularly the upper  
15 basin. Not all of the defendants were involved in the same projects. Each defendant's  
16 involvement, if any, will be described as it relates to each project.

17 The motivation for these various projects was based upon concerns from landowners and  
18 area citizens. Those concerns varied. They included concerns for the flooding of upper  
19 basin lands, especially as it related to lands immediately adjoining water channels and upper  
20 basin lakes, addressing the low elevations being experienced by Devils Lake, addressing fish  
21 and wildlife habitat, and even recreation.

22 416. The plaintiffs have identified fifteen projects which are listed in Findings of Fact Number  
23 10. The plaintiffs assert that the defendants participated in these projects to varying degrees.  
24 The plaintiffs also maintain through the opinion of their expert witness, Cecelio Olivier, and  
25 others, that these fifteen projects caused excess water to discharge into Devils Lake that  
26 would not have otherwise entered it, thereby being the proximate cause of the flooding of  
27 the lake and the taking or damaging of the plaintiffs' properties.

28 Part of the basis for the plaintiffs' expert opinions relies on certain fact determinations  
29 regarding the different projects. These facts were in turn used to make calculations for the  
30 plaintiffs' expert opinions. Therefore, a review of each project is appropriate and necessary.

31 417. Stephen Hoetzer was employed with the State Water Commission for a period from 1971 to  
32 1979. For several years after his employment with the SWC, he was part of a private  
33 consulting firm and through that remained involved in some of the Devils Lake Basin water  
34 projects. In 1970 he received a degree in civil engineering. He is a licensed civil engineer.

1 He was actively involved and/or familiar with many of the Devils Lake Basin projects  
2 identified by the plaintiffs either through his employment with the State Water Commission  
3 or subsequently when he worked on projects in the Devils Lake Basin through the  
4 engineering consulting firm of which he was a part.

5 418. The defendants objected to Stephen Hoetzer's testimony when opinion testimony was  
6 solicited from him by the plaintiffs. Some of the objections were timely made. But not all  
7 were. For example, without objection Mr. Hoetzer was allowed to testify as to the impact of  
8 channel improvements relating to the Hammer-Sullivan Drain. TT Vol. 2 p.305; he  
9 provided a broad and general description of hydrology and engineering standards relating to  
10 the design of engineering projects relating to water, generally see TT Vol. 1 p.70 66-116; he  
11 discussed the general hydrology of the Devils Lake Basin which required some degree of  
12 expertise in his field, TT Vol 1 p.172-174. As indicated, however, there were some  
13 objections timely made to Mr. Hoetzer's testimony as an expert on grounds that the opinions  
14 had not been previously disclosed as opinions he held. See TT Vol. 2 at p.342-52, 396-405,  
15 414-8, Vol. 4 at 698-704, 706-8 and 835-6). This trial court provisionally accepted the  
16 opinions of Mr. Hoetzer on the basis that this was a bench trial and that if an adequate  
17 foundation was not met the court could disregard his testimony. The court also advised the  
18 party defendants that they could renew their objection through post trial briefs and reargue.  
19 In its post trial brief the state of North Dakota has continued the objection for the party  
20 defendants. (Post trial brief of State of North Dakota at p.6) In its reply brief the plaintiff  
21 provides no response to the continuing objection and the plaintiffs do not offer any proof  
22 that the opinions elicited by them as cited above in the trial transcript were previously  
23 provided in a manner that reasonably informed the defendants these were opinions of  
24 Stephen Hoetzer. To the contrary, the evidence cited is that there were no opinions offered  
25 on these specific questions attributable to Stephen Hoetzer through discovery efforts  
26 including the deposition of Mr. Hoetzer. In fact, at his deposition, Mr. Hoetzer  
27 acknowledged that he conducted no engineering analysis and rendered no engineering  
28 opinions. Defendants assert that they relied on these answers in its further discovery efforts  
29 and trial preparation and thereby were prejudiced.

30 This court agrees that the expert opinions of Stephen Hoetzer were not properly disclosed.  
31 However, this court is not satisfied that prejudice resulted from that. The opinions were  
32 limited in nature. Further, he did not seek to quantify the impact of any of the projects. The  
33 opinions, although not assigned to being from Stephen Hoetzer were otherwise imbedded in  
34 the opinions previously disclosed to the defendants attributable to their expert, Cecelio

1 Olivier. Consequently, over objection the court will allow the opinion testimony of Stephen  
2 Hoetzer, which he provided at trial. Notwithstanding this ruling, there were inconsistencies  
3 identified by the defendants both in sworn testimony he provided prior to trial as well as  
4 during trial. This did impact his credibility to some degree.

5 419. One of the earliest projects involved the Lake Irvine control structure. Lake Irvine is located  
6 within the Mauvais Coulee sub-basin and on the Mauvais Coulee which transitions into the  
7 Big Coulee below Lake Irvine. It is located below Lake Alice in the chain of lakes and is  
8 just above U.S. Highway 2. Before Channel A was constructed all of the upper basin waters  
9 (except that flowing through the Little Coulee) would flow through the chain of lakes and  
10 enter Lake Irvine. The waters would then outlet into Big Coulee, including Pelican Lake,  
11 and ultimately flow into the west bay of Devils Lake.

12 420. The Lake Irvine Outlet was part of the Project 416.<sup>1</sup> It also included the construction of the  
13 Lake Alice Outlet. Participants in this project included the Chain of Lakes Water  
14 Conservation Flood Control District of Ramsey County, North Dakota. This is manifested  
15 by Plaintiffs' Exhibit 261 which is a notice of public hearing by the Chain of Lakes Water  
16 Conservation Flood Control District to implement this project. In addition, the State Water  
17 Commission and/or its predecessor assisted in the design and construction of the project.

18 421. Plaintiffs' Exhibit 272, an office memo issued by Cary Backstrand of the North Dakota  
19 State Water Commission outlined a history of the work on Lake Irvine and its channel  
20 below the lake. Backstrand was employed as an engineer with the State Water Commission  
21 from 1979 to 1999. He received a civil engineering degree in the 1970's and focused on the  
22 field of hydrology. He was actively involved and/or familiar with many of the Devils Lake  
23 Basin projects identified by the plaintiffs. That memo was created from Backstrand's  
24 review of agency files. It reveals that although channel work was performed as early as  
25 1905, it appears that it was not until 1946 that a plan was established to ease flooding in the  
26 Lake Irvine area that incorporated the installation of an outlet control structure for Lake  
27 Irvine and channel improvements.

28 At least by 1958 but perhaps as early as 1957 a timber box culvert with slide gates was  
29 constructed near the natural outlet of Lake Irvine. (See Plaintiffs' Exhibit 272 as well as the  
30 testimony of Steven Hoetzer, Cary Backstrand and Dale Frink).

31 422. Exhibit 266 sets out a diagram of the control structure that was installed at this time. It  
32 consisted of eight wood gates. The top of the concrete base of the structure was set at an  
33

34 <sup>1</sup> A number of Devils lake Basin projects subsequent to this project were  
filed under Project 416. As one witness stated, the file for Project 416  
became an "Octopus".

1 elevation of 1437.4 feet. Each of the gates was five feet wide. They were designed in the  
2 manner to allow planks approximately one and five-eighths inch thick to be slid into them  
3 so that with the top plank in place, the top of the gate was set at 1441.6 feet elevation. Each  
4 gate then had a cranking system that allowed the gate to be lifted to the extent determined to  
5 be appropriate depending upon the conditions at any given time. The complete diagram of  
6 the gate structure is set out at Plaintiffs' Exhibit 266. These gates were installed at a section  
7 line roadway and bridge near, but not at the exact location of the natural outlet. It was on  
8 the north boundary of T155 North R86W. There is evidence that these gates were  
9 sometimes open, although there is no adequate evidence to determine how often they were  
10 opened or for how long. According to one witness, Steven Hoetzer, he observed the gates  
11 open many times.

12 423. Regardless of where the control structure was located, the more persuasive evidence  
13 supports the finding that the natural outlet was located 200 feet north of the control  
14 structure on what was described as a beach line. This is based on the following:

- 15 a. Dale Frink, the State Engineer, testified based on his observations while at  
16 the site at different relevant times, that it was the top of the beach line that  
17 actually served as the elevation control for Lake Irvine. This location also  
18 had an elevation of 1441.6 feet.
- 19 b. The contour lines and markings set out on Plaintiffs' Exhibit 37 is consistent  
20 with this location.
- 21 c. Stephen Hoetzer testified that the control structure was located within a  
22 couple hundred feet of the natural overflow section or outlet of the lake.

23 424. There is a dispute as to what the natural outlet elevation of Lake Irvine was. For reasons set  
24 forth below this court finds that the natural outlet of Lake Irvine was 1441.6 feet. This is  
25 based upon the following:

- 26 a. There is evidence that at some point in the historical past the elevation of  
27 Lake Irvine may have been greater than 1441.6 feet. Plaintiffs' Exhibit 254  
28 is a report submitted by the State Water Conservation Commission in July  
29 of 1947. In the narrative content of that report, it describes different natural  
30 outlets at different elevations from as low as 1443 feet to 1448 feet.  
31 However, these overflow elevations related to overflow into surrounding  
32 lowland depressions east of the lake – not to the overflow outlet that would  
33 direct water in the lower Mauvais Coulee or Big Coulee. It is probable that  
34 this high elevation report is based on an inability of the downstream channel  
to efficiently accept the excess water relative to the outlet or channel size.  
These higher elevations are inconsistent with other more reliable evidence.
- b. Steven Hoetzer determined that the natural outlet elevation of Lake Irvine  
was 1443 feet. He based this conclusion on his reliance of Plaintiffs'  
Exhibit 37 and 443. Exhibit 443 is a survey map of Lake Alice dated

1 January 30, 1978 and also contains relevant portions of Lake Irvine,  
2 including the natural outlet area. By looking at topographical lines on  
3 Plaintiffs' Exhibit 443, Hoetzer concluded that by his analysis of them, the  
4 natural outlet was at 1443 feet elevation. In their reply brief at p.32  
5 plaintiffs suggest this was a map approved by the State Engineer. The  
6 exhibit, record and testimony does not support that claim. Plaintiffs also  
7 suggest Plaintiffs' Exhibit 443 "identified" 1443 msl as the actual natural  
8 overflow elevation. There is no engineering statement or certification on the  
9 map doing so.

10 c. The quality of Plaintiffs' Exhibit 443 as an evidentiary exhibit is poor and  
11 there is no indication who produced it. A review of it does not show how  
12 Mr. Hoetzer reached his conclusion from his own analysis of it. The  
13 topographical lines and markings are difficult to read. Further, Plaintiffs'  
14 Exhibit 37 is inconsistent with Hoetzer's own determination regarding the  
15 outlet elevation. Exhibit 37 was a survey done by A. Radspinner, a  
16 surveyor, and certified to in November of 1954. It includes a topographical  
17 map of the Lake Irvine Outlet. It clearly sets out the contour lines and  
18 elevations. The natural outlet is not identified as being at the control  
19 structure's location along the section line roadway. Rather, the survey map  
20 locates the natural outlet some distance to the north of it. More importantly,  
21 it identifies the outlet elevation at 1441.6 feet, pointing it to a topographical  
22 elevation line that is consistent with that determination.

23 d. The State Engineer, Dale Frink, testified that notwithstanding the control  
24 structure that was built in the 1950's and then rebuilt in 1996, the natural  
25 outlet was a beach line approximately 200 feet to the north of the control  
26 structure on the section line roadway. He had been at this location different  
27 times during his employment. He also testified that the outlet elevation at  
28 that location was 1441.6 feet. All this testimony is consistent with the  
29 location identified on the survey in Plaintiffs' Exhibit 37 and also is  
30 consistent with the elevation description on the map itself.

31 e. In an administrative order of the State Engineer, findings of facts were made  
32 in February of 1984 for the purpose of re-establishing the outlet elevation of  
33 Lake Irvine. Both the findings and the order determined that the outlet  
34 elevation was 1441.6 feet msl.

f. Although there is some indication in the evidence that the control structure  
itself was open at a point below 1441.6 feet, there is no evidence in the  
record that the natural outlet located in the beach area approximately 200  
feet to the north was ever manipulated or modified to alter the natural  
elevation outlet of Lake Irvine to something different than 1441.6 feet msl.

g. Stephen M. Hoetzer himself as an engineer for the North Dakota State Water  
Commission acknowledged in a letter dated July 25, 1977 that the elevation  
of 1441.6 feet msl was the elevation for not only the top of the existing gates  
of the control structure but also, *"the elevation of the original outlet based  
on the 1954 survey date"*. (Plaintiffs' Exhibit 289). Hoetzer had been at

1 this location several times. There is no indication in this letter he questioned  
2 his own statement in the letter.

- 3 h. It is recognized that Plaintiffs' Exhibit 269, an agreement for the operation  
4 of the Lake Irvine control gates states that the gated control structure,  
5 "*controls the flow of water from Lake Irvine . . . into Mauvais Coulee*"  
6 However, neither this document or other evidence indicates that somehow  
7 the natural outlet was modified in a way to allow for a draw down of the  
8 lake at the natural outlet to 1437.4 feet. It just as reasonably suggests that  
9 depending on the volume of overflow from the natural outlet, that the  
10 control gates were capable of moving that water under the bridge at a greater  
11 volume when the gates were open, providing the downstream channel  
12 accommodated that flow.

13 Based on the above, the more persuasive evidence is that the natural outlet elevation of Lake  
14 Irvine is 1441.6 feet msl and that water in Lake Irvine had to reach this level to flow out of  
15 the lake and into Big Coulee even after the control structure was put in place a short distance  
16 downstream.

- 17 425. Even with the installation of the control structure the evidence does not substantiate that the  
18 structure functioned in the role of controlling the elevation of the lake insofar as lowering  
19 the lake below 1441.6 feet to 1437.4 feet. This is based on previous findings and the  
20 following:

- 21 a. From 1971 to the time of trial and except for a period of 1985 to 1989 when  
22 he managed the Southeast Pipeline Project, Dale Frink was employed in an  
23 engineering capacity with first the State Water Commission and then State  
24 Engineer. Much of his work involved or caused him to become familiar  
25 with many of the projects in the Devils Lake Basin identified by the plaintiffs.  
26 He has a civil engineering degree and a masters degree in agricultural  
27 engineering. He testified the Lake Irvine control structure did not function  
28 from at least 1980 to 1996 because the timber caught fire making the  
29 structure inoperable. (See Trial Transcript, Volume 13, p.3331). There he  
30 stated:

31 Q. And how are you familiar with Lake Irvine?

32 A. I've been at Lake Irvine many times over the years.

33 Q. There's been some discussion in this case about a box culvert, the  
34 existence of a box culvert and whether it was open or shut. Could you  
describe the area around the box culvert and the shoreline of Lake  
Irvine, where water flows out of Lake Irvine?

A. Yes, the box culvert or control structure that you mention, that's  
actually on a section line below Lake Irvine. The actual control is  
natural elm (phonetic) about 200 feet north of that.  
The box culvert, the original was a timbered, a box timbered structure  
that caught fire at some point and it has been totally inoperable from  
at least 1980, when I first started to go. So it's been a -- the original

1 structure was totally inoperable from 1980 to 1996 when it was  
2 replaced.

3 The gates, there are gates on it. Most of the gates were actually wide  
4 open. Some of them were half shut and – but the structure did not  
5 function.

6 Q. But was your testimony that the beach was the actual control of Lake  
7 Irvine?

8 A. There is a beach line about 200 feet upstream of that. The top of that  
9 beach line is 1441.6 and that actually serves as the control for Lake  
10 Irvine. . . .

- 11 b. Once the control structure was installed a channel from the natural outlet to  
12 the control structure needed to be improved. It is not evident that it was.  
13 None of the witnesses made reference to an improved channel from the  
14 natural outlet to the control structure. By November 8, 1956 channel work  
15 still had not been done. (See Plaintiffs' Exhibit 263). The State Engineer in  
16 a letter to the USFWS indicated that.
- 17 c. Subsequent to that letter objections to the project were filed by the Benson  
18 County Water Resource District on November 19, 1956 (Plaintiffs' Exhibit  
19 264) protesting efforts to lower the lake.
- 20 d. The only work done to that point was the partial installation of the box  
21 culverts, according to a letter of December 21, 1956 from the State  
22 Engineer. The letter goes on to indicate a need to construct the proposed  
23 ditch from "the lake 400 feet south of the culverts". It was anticipated  
24 dynamiting instead of excavating might be required. (Plaintiffs' Exhibit  
25 265). It was at these box culverts that the sliding gates or control structures  
26 were to be placed. (See Plaintiffs' Exhibit 266). There is no evidence this  
27 dynamiting or excavation at this location was ever done above the culverts.
- 28 e. The design plan done in April of 1955 clearly indicates that channel  
29 improvements were intended from the control structures at the roadway and  
30 then down to Six Mile Bay. However, the design plan shows no engineering  
31 markings suggesting channel improvements from the natural lake outlet to  
32 the control structure. (See Plaintiffs' Exhibit 444).
- 33 f. The design plan dated 10-31-75 for channel improvements also shows no  
34 indications of improvements to the channel between the natural outlet and  
the control structure at the roadway. It clearly begins the proposed  
improvements at the roadway and control structure. (See Plaintiffs' Exhibit  
39).

30 Even if the original purpose of this control structure when it was put in place was to  
31 somehow eventually serve as the control outlet of Lake Irvine it is evident that this did not  
32 happen. Rather, that function has more likely been performed by the natural outlet itself.

33 426. The natural outlet of Lake Irvine at 1441.6 feet is the location that has over the past decades  
34 primarily controlled the level of Lake Irvine, and not the control structure built in the 1950's.

1 In light of the location of the control structure from the natural outlet 200 feet away, its  
2 primary intended function was to move overflowing water more quickly into the channel, that  
3 is, to increase the capacity of the channel at this point from where the structure was located to  
4 move water off the lake until it reached an elevation of 1441.6 feet. The plaintiffs had the  
5 ultimate burden of proof in this respect. They have not met it. Even plaintiff's witness,  
6 Stephen Hoetzer acknowledged he was not aware whether the control structure operated at a  
7 level below the natural outlet elevation.

8 427. For the few times that Stephen Hoetzer observed the Lake Irvine control structure gates, he  
9 testified that he saw them both in an up and down position. This is inconsistent with Cecelio  
10 Olivier's testimony that Mr. Hoetzer says he never saw the control gates closed. Olivier  
11 relied on the latter to assist him in making his calculation for the Lake Irvine outlet structure.  
12 Essentially at some point these control gates became non-functional for not only the reason  
13 that they were subjected to damage by fire, but because the water ended up flowing through a  
14 large culvert to the west and north of the structure after it overtopped the natural outlet on the  
15 beach line at 1441.6 feet msl. It then passed under the roadway at a different location before  
16 entering the coulee. In any event, the relevance and persuasiveness of this is diminished  
17 because of the true location of the natural outlet and the elevation of it.

18 428. Although Plaintiffs' Exhibit 282 reflects an indication that an illegal bypass of the Lake  
19 Irvine outlet control structure existed prior to September 30, 1969, that exhibit also reflects  
20 that the State Water Commission was taking action against the Chain Lakes Water  
21 Management District to close this bypass. There is no sufficient evidence what impact, if  
22 any, this illegal drain had on the elevations of Devils Lake during the time it was in existence.  
23 There is no evidence even of how long it was in place. In any event, from considering all of  
24 the evidence the most persuasive evidence is that the natural outlet that had an elevation of  
25 1441.6 feet msl was left to overflow naturally into this channel and water did not flow into  
26 Big Coulee below Lake Irvine unless it overflowed first at this natural outlet location at an  
27 elevation of 1441.6 feet.

28 429. Much of this evidentiary discussion is academic. The plaintiff's expert in making  
29 calculations used 1441.6 feet as the outlet elevation for Lake Irvine. Further, the plaintiffs  
30 admit that once Devils Lake reached an elevation of 1437.4 feet, the Lake Irvine control  
31 structure would no longer be functional. This elevation was reached at that location in the  
32 spring of 1996.

33 430. At some time prior to October of 1983 the Ramsey County Water Resource District initiated  
34 activities below the natural outlet of Lake Irvine for the purpose of bypassing the control

1 gates constructed on the section line and lowering the outlet of Lake Irvine to 1439 feet msl.  
2 This is manifested by Plaintiffs' Exhibit 294 and Plaintiffs' Exhibit 293<sup>2</sup>. From the evidence  
3 it appears the water district directed water flow to another culvert passing under the section  
4 line roadway at a different location than the control structure before it was routed back into  
5 the channel towards Devils Lake. Ultimately, the Ramsey County Water Resource District  
6 was required by the State Engineer in February of 1984 to insert a channel block in this  
7 bypass channel they had constructed. There is no evidence how long this bypass was in place  
8 or what impact, if any, it had on lake elevations.

9 431. Project 416 and the Lake Irvine control structure was initiated by the Board of  
10 Commissioners of the Chain Lakes Water Conservation and Flood Control District in  
11 Ramsey County North Dakota on July 31, 1956. There was apparently some involvement by  
12 Ramsey County, a political subdivision who is not a party to this litigation. In a letter dated  
13 November 8, 1956 from the State Engineer that person, Mylo W. Hoisveen, states to the  
14 regional director of the U.S. Fish and Wildlife Service that, "*The State Water Conservation*  
15 *Commission decided at their meeting held on November 7, to cooperate with the Ramsey*  
16 *County Board of Commissioners in constructing a combination bridge and control structure*  
17 *at the outlet of Lake Irvine.*" The letter goes on to state that, "*The county and the State*  
18 *Water Commission will be in a position to start work on the bridge and control structure*  
19 *within the next ten days.*" This letter is the most persuasive evidence that these were the  
20 entities involved in the efforts to accomplish the goals of Project 416. Other correspondence  
21 also supports the conclusion that Ramsey County, a non-party, was involved in the project.  
22 For example, a letter dated December 21, 1956 from the State Engineer to the county  
23 commissioners of Ramsey County provides a progress report. Finally, there is an agreement  
24 to maintain the control structure between the State Water Commission, Benson County Water  
25 Management District, Chain Lakes Water Management District, and the Sweetwater Dry  
26 Lake Water Management District. (See Plaintiffs' Exhibit 269). The Chain Lake Water  
27 Management District was dissolved and merged into the Sweetwater-Dry Lake Water  
28 Management District. (Plaintiffs' Exhibit 386). Ultimately, the Sweetwater Dry Lake Water  
29 Management District was dissolved and taken in by the Ramsey County Water Resource  
30 Board. (See Plaintiffs' Exhibit 271). Consequently, the Ramsey County Water Resource  
31 District would have absorbed the obligations and liabilities of the Sweetwater Dry Lake  
32  
33

34 <sup>2</sup> It is noted that Plaintiffs' Exhibit 293 and Plaintiffs' Exhibit 272 are identical.

1 Water Management District as well as the Chain Lake District, and that is reflected in the  
2 minutes of the reorganization meeting of May 18, 1974.

3 432. Based upon the above, the Ramsey County Water Resource District and the North Dakota  
4 State Water Commission are the two entities that are responsible for the efforts to construct  
5 the Lake Irvine control structure who are also parties to this action. Further, these entities  
6 together with the Benson County Water Resource District are also responsible and liable for  
7 efforts thereafter to maintain it and control it. (See Plaintiffs' Exhibit 269). However, for  
8 reasons set out in the previous and subsequent findings, the plaintiffs have not proved this  
9 project by itself or in combination with other projects was a proximate cause of any damages  
10 or taking claimed by the plaintiffs.

11 433. The plaintiff's expert witness, Cecelio Olivier, opined that the total amount of runoff into  
12 Devils Lake from 1975 through 2005 was 5,051,616 acre feet. He acknowledged that at an  
13 elevation of 1449.2 feet at the time of trial, that the current volume of water in Devils Lake is  
14 2,718,943 acre feet. So, the total inflow volume of 5,051,616 acre feet asserted by Mr.  
15 Olivier does not take into account the function of evaporation or other reasons over those  
16 decades in reducing the quantity of water currently in the lake which Olivier acknowledged.  
17 Mr. Olivier also opined what the total volume of water was entering Devils Lake during other  
18 time periods relative to the beginning of certain projects. (See Trial Transcript Volume 6,  
19 p.1586-1587).

20 Those opinions do not consider three important factors when Olivier offered these opinions.  
21 First, the plaintiffs are claiming damages or taking of their property up to the time of trial in  
22 August of 2006. So, they cannot disregard water volume flow just back to the start of a  
23 project. They must go back to the first year of the first project, Lake Irvine. This is 1957.  
24 This is the year they claim that damaging water began to commingle in Devils Lake. Second,  
25 they claim damages up to August of 2006. So, they must consider all of the inflowing water  
26 to that time because it also is commingling and allegedly creating damage until that time.  
27 Third, to make a fair percentage comparison of the alleged impact of inflowing waters they  
28 should have considered what water left Devils Lake by evaporation or otherwise. To do that  
29 the water volume in Devils Lake in 1957 should have been added to the "pool". That volume  
30 was 411,138 acre feet.

31 Mr. Olivier's testimony on this is based upon calculations he and his office, EOR, made.  
32 Those calculations are set out in Defendant's Exhibit 2242. Using that exhibit it is possible  
33 to add the annual inflow volume of Devils Lake stated on Defendant's Exhibit 2242 for the  
34 time period of 1957 through 2005. The exhibit does not provide the water volume inflow for

1 2006. So, that is not included. In addition, Plaintiffs' Exhibit 511 had gauge data for the  
2 elevation of Devils Lake for only January in 2005. So, the 2006 elevation was used. The  
3 total inflow volume into Devils Lake from 1957, the first year of the first project (Lake  
4 Irvine's control structure), through 2005 based on Defendant's Exhibit 2242 was 6,000,727  
5 acre feet. The current volume of Devils Lake at trial was 2,718,943 acre feet. In 1957 the  
6 water volume in Devils Lake was 411,138 acre feet. That 1957 volume should be added to  
7 the 2006 volume to make it part of the pool. This total volume is 6,411,605 acre feet. It is  
8 recognized that some part of this would also be direct run off and direct precipitation but that  
9 information is not available for inputting. This means that approximately 3,692,922 acre feet  
10 of water that discharged into Devils Lake from 1957 through 2006 evaporated, or drained  
11 into Stump Lake, or was otherwise lost. This constitutes approximately 57.6% of the waters  
12 flowing into Devils Lake without accounting for direct runoff and precipitation entering the  
13 lake or the 2006 inflow. (3,692,922 acre feet divided by 6,411,865 acre feet). Because this  
14 water over all this time commingled, it is this trial court's opinion this analytical process  
15 should have been applied in determining the percentage impact any of these projects  
16 allegedly had on causing the elevation increases in Devils Lake. Some additional explanation  
17 is provided on this issue at Finding 613.

18 This court will address both Mr. Olivier's opinion of the claimed percentage impact of the  
19 projects and this court's own analysis as described above with the recognition of limitations  
20 to both of these resulting percentages.

21 Through the modeling process addressed hereafter, Mr. Olivier also opined that some of the  
22 projects contributed a specific volume of water into Devils Lake during a portion or all of this  
23 time period when certain water bodies were drawn down, if at all. Dividing this quantity of  
24 water for a particular project by the volume of water Mr. Olivier calculated flowed into  
25 Devils Lake since a particular project's beginning, Olivier determined specific percentages  
26 for lost storage of water bodies from certain projects relative to the total volume of water  
27 flowing into Devils Lake.

28 433A. As stated in the case of Knutson v. City of Fargo 2006 N.D. 1997 §9, 714 N.W. 2d 44, our  
29 supreme court held that:

30 *To prove inverse condemnation, the property owner must prove that a*  
31 *public entity took or damaged his or her property for a public use and that*  
32 *public use was the proximate cause of the damage.*

33 In Jones v. Ahlberg, 489 N.W. 2d 576, 581 (N.D. 1992) our Supreme Court held that  
34 proximate cause was, "that cause which, as a natural and continuous sequence, unbroken by  
any controlling intervening cause, produces the injury, and without which it would not have

1 occurred." Further, our court in Beilke by Beilke v. Corvell 524 N.W. 2d 607, 609 (N.D.  
2 1994) addressed the "substantial factor" test as a component to the definition of probable  
3 cause and its application. In Beilke by Beilke, *supra*, the court stated:

4 *In the instant case the jury was instructed that a proximate cause is "a*  
5 *cause which had a substantial part in bringing about the injury either*  
6 *immediately or through happenings which follow one another. Not only*  
7 *did this part of the instruction inform the jury that other events or causes*  
8 *that occur simultaneously with or that follow the defendant's negligence*  
9 *will not negate the defendant's liability, it also instructed the jury on the*  
10 *"substantial factor" test for proximate cause. The "substantial factor"*  
11 *test was created by courts to provide for an adequate definition of*  
12 *proximate cause in those cases in which the alleged facts support*  
13 *concurrent causes and in which the traditional "but for" definition tended*  
14 *to mislead juries. (Citations omitted). In particular, the "substantial*  
15 *factor" instruction was created to adequately define legal causation in*  
*those cases in which multiple "causes concur to bring about an event and*  
*either one of them, operating alone, would have been sufficient to cause*  
*the identical result." (Citations omitted).*

16 In its Memoranda Decision and Order of February 8, 2006 this court acknowledged that  
17 N.D.C.C. 32-03.2-02 applied to claims made for inverse condemnation. As a consequence,  
18 as a general rule a defendant would be only severally liable and not jointly liable for any  
19 damages arising from a successful claim for inverse condemnation.

20 In its memoranda decision and order dated February 8, 2006 this trial court agreed with the  
21 plaintiffs that in Lang v. Wonneberg 455 N.W. 2d 832 (N.D. 1990) our Supreme Court  
22 recognized an additional exception to the several liability requirement of N.D.C.C. 32-03.2-  
23 02 that would otherwise be applicable in apportioning fault and damages in an inverse  
24 condemnation case. In doing so, this trial court cited Lang v. Wonneberg *supra* at p.828  
25 where our court held:

26 *Section 433A of the Restatement 2nd of Torts (1965) states that damages*  
27 *for harm are to be apportioned among two or more causes only when*  
28 *there are distinct harms or there is a reasonable basis for determining the*  
*contribution of each cause to a single harm.*

29 The plaintiffs argued and still do that the contribution of each cause, the fifteen projects, to  
30 the harm caused to the plaintiffs' properties is not indisputably distinct and that it is an  
31 evidentiary issue whether there was a reasonable basis for determining the contribution of  
32 each cause in a case such as this. See Thorson v. City of Minot 153 N.W. 2d 764 (N.D.  
33 1967). Although the defendants continue to argue this court misapplied Lang v. Wonneberg,  
34

1 *supra* and the application of joint and several liability, this court stands by its earlier legal  
2 conclusions.

3 Having stated that, this court finds that the evidence supports a factual determination that at  
4 least as to some of the projects (particularly those identified in Plaintiffs' Exhibits 331-386  
5 and the claim relating to wetland damage) and therefore some of the defendants, there is a  
6 reasonable basis for determining each defendant's contribution or at least each project's  
7 contribution to the single harm allegedly caused, for the taking or damages to the plaintiffs'  
8 properties due to the increased elevations experienced on Devils Lake. The plaintiffs  
9 themselves have presented evidence which allows for reasonable apportionment for certain  
10 projects and defendants.

11 434. It is the opinion of the plaintiffs through their expert witness, Cecelio Olivier, that total  
12 waters which entered Devils Lake from 1957 through 1997 was 3,866,850 acre feet. It is also  
13 his opinion that the Lake Irvine outlet project contributed 72,671 acre feet of water into  
14 Devils Lake from 1957 through 1997. (See Plaintiffs' Exhibit 333). If correct, Olivier  
15 opines that this amount divided by the total volume results in the Lake Irvine project  
16 contributing 1.87 percent of the total volume of all of the waters that have entered Devils  
17 Lake in this time period. For reasons set forth below and from other findings in this decision,  
18 this trial court finds that the opinion that the Lake Irvine outlet control structure project  
19 caused 72,621 additional acre feet of water to discharge into Devils Lake due to lost storage  
20 is not reliable and not proved. This is based on the following:

- 21 a. For reasons explained in subsequent findings, the plaintiffs' adoption of the  
22 West Report factor of .1865 to calculate the lost storage discharge is not  
23 reliable. (See Finding 608).
- 24 b. The facts assumed by Olivier in making his calculations are not correct.  
25 First, the evidence is not sufficient to find an initial draw down in 1957.  
26 Second, the evidence is that the control structure did not control the lake  
27 elevation. So, the evidence is insufficient that any gate opening activities to  
28 1437.5 feet caused the lake to also be drawn down to that level. Third, the  
29 evidence is insufficient to presume as Olivier admitted in his testimony that  
30 from 1957 to 1997 the gates were always open.
- 31 c. Other evidence is inconsistent with the annual impact calculations set out on  
32 Plaintiffs' Exhibit 333. The gauge flow data for flow volume downstream  
33 for 1957, 556 acre feet, does not support the huge draw down claimed by  
34

1 plaintiffs in 1957. This court is not persuaded by Mr. Olivier's later  
2 testimony where he attempts to alter the year the draw down occurred.

3 d. The Y factor used in the formula to calculate the cumulative impact of this  
4 project presume facts not supported by the evidence and as explained in later  
5 findings. (See Finding 607).

6 e. Additional calculations used by Olivier to reach the calculations of annual  
7 impact in Plaintiffs' Exhibit 333 have not been explained in a manner  
8 sufficient to analyze or scrutinize them or otherwise rely on them. (See  
9 Finding 607).

10 435. It is this court's finding that even if it is accurate, this contribution, 1.87 percent of the total  
11 volume of Devils Lake between 1977 through 1997, would not constitute a substantial part or  
12 cause in bringing about any damage or taking claimed by the plaintiffs.

13 The percentage claimed by the plaintiffs of 1.87% is arguably high based on their original  
14 methodology. This is why. The plaintiffs are claiming damages for water elevations up to  
15 1449.2 feet at the time of trial, or in other words, through August 2006. So, by plaintiffs'  
16 own calculations gleaned from Defendant Exhibit 2242 which plaintiffs prepared, the total  
17 inflow volume that should be considered relative to the Lake Irvine project is not 3,866,850  
18 acre feet. Rather, it should be 6,000,727 acre feet, the relatively same time period the  
19 plaintiffs claim that damages or a taking occurred. By that figure, and without accounting  
20 for loss once the water discharged into Devils Lake, the percent that the Lake Irvine control  
21 structure contributed, if at all, to the impact on lake levels was 1.21%, not 1.87%. This is  
22 even less of a claimed contribution.

23 All of these possible percentage contributions are extremely low from a factual standpoint.  
24 So, they negate a finding of proximate cause as to this project just based on this.

25 436. Giving the plaintiffs the benefit of the doubt for the purpose of addressing this issue, this  
26 evidence testified to by Cecelio Olivier and presented in Plaintiffs' Exhibit 333 and  
27 Defendants' Exhibit 2242, serves as a reasonable factual basis to apportion the contribution  
28 of this project to the harm claimed by the plaintiffs. Consequently, several liability only  
29 would apply to any damages or taking suffered by those plaintiffs as a result of the Lake  
30 Irvine control structure project. That contribution would only constitute 1.21% or 1.87% of  
31 the total damages, if any, suffered by plaintiffs as originally testified to by Mr. Olivier.

32 437. Even presuming that this opinion of lost storage by plaintiff's expert is reliable (and this  
33 court believes it is not), it also means that the defendants involved in this project would not  
34 be liable for any lands flooded after late May of 1997 because by then Devils Lake had

1 reached over 1441.6 feet in elevation and had flowed back into Lake Irvine making it a part  
2 of Devils Lake.

3 438. The plaintiffs also contend that channel improvements in Big Coulee (Lower Mauvais  
4 Coulee)<sup>3</sup> were initiated by some of the defendants and that this also contributed to subsequent  
5 flooding and increased flows of water into Devils Lake. The testimony reflected efforts to  
6 clean, maintain or improve the Big Coulee for decades. In 1954 there was a complaint of  
7 flooding along the Big Coulee. Consequently, in 1954 the State Water Conservation  
8 Commission inquired into the causes for the flooding along the coulee. It was determined  
9 that there were a number of obstacles that created channel obstructions to one degree or the  
10 other and which retarded water flow. This is described in Plaintiffs' Exhibit 256. From this  
11 inquiry it was recommended that a water resource district be created. *Id.*

12 The cleaning of the channel itself to eliminate retarded flow cannot be used as a basis to  
13 claim that this increased the waters in Devils Lake over a span of time and a case for inverse  
14 condemnation. It is well within the legal authority to maintain channels and ditches by  
15 cleaning them out. Further, during dry periods, it is common for these types of channels to  
16 fill up with silt and also experience vegetation growth.

17 439. Part of Project 416 included a proposal to deepen and widen the channel below Lake Irvine  
18 by the State Water Commission. (See Plaintiffs' Exhibit 259). There was even a public  
19 hearing held by the Chain Lakes Water Conservation and Flood Control District to consider  
20 the project and its funding. Strong resistance to that effort was met by the Benson County  
21 Water Resource District. (See Plaintiffs' Exhibit 264).

22 There is a huge time gap between the proposal to widen and deepen the channel, removal of  
23 obstacles in it and objections made to the proposal, to the next evidence of any activity  
24 involving Big Coulee below Lake Irvine. The original plans set out in Plaintiffs' Exhibits  
25 444 and 445 were prepared in 1955. Here the evidence trail ends. The next evidence of any  
26 work on the channel is found in Plaintiffs' Exhibit Number 268. It shows channel  
27 improvement costs for a time period November 1, 1967 to August 31, 1968. (See Plaintiffs'  
28 Exhibit Number 268). Relying on the office memo of Cary Backstrand of the North Dakota  
29 State Water Commission to provide a historically accurate reflection of what transpired  
30 regarding channel clean out and improvements, there is no indication that any actual channel  
31 improvements were made to Big Coulee until 1967. The Backstrand memo also indicates  
32

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33 <sup>3</sup> Much of the evidence refers to Mauvais Coulee rather than Big Coulee. They  
34 are one and the same. However, this court has chosen to label it Big Coulee  
once it discharges out of Lake Irvine, remaining consistent with Plaintiffs'  
Exhibit 500A.

1 that the State Water Commission participated with the Sweetwater-Dry Lake and Chain Lake  
2 Water Management Districts in cleaning out the Mauvais Coulee from Lake Irvine south  
3 approximately four miles. There is no indication that this involved deepening or widening of  
4 the channel. To the contrary, Plaintiffs' Exhibit 279 is an agreement dated June 2, 1967  
5 whereby the State Water Commission describes the project as "causing Mauvais Coulee to be  
6 partially cleaned out from the outlet of Lake Irvine in Ramsey County downstream to station  
7 210 + 00 which covers land in Ramsey County and Benson County North Dakota . . .".  
8 Similarly, Plaintiffs' Exhibit Number 280 describes the project as one of partially cleaning  
9 out the channel. *Id* This is also true of Plaintiffs' Exhibit 284 and Plaintiffs' Exhibit 286. In  
10 fact, considering that the estimated cost of the project in 1975 was \$76,000.00 as noted in  
11 Plaintiffs' Exhibit 287 and that the final cost for the project was \$22,000.00 as set out in  
12 Plaintiffs' Exhibit 278 the only inference that can be made is that the character of the project  
13 was substantially reduced in scope. There is no adequate evidence showing the work that  
14 was done in 1967 accomplished the plan specifications for deepening and widening the  
15 channels contained in Plaintiffs' Exhibit 444, Plaintiffs' Exhibit 445 or Plaintiffs' Exhibit 39.  
16 Plaintiffs' Exhibit 39 is a channel improvement engineering plan dated October 31, 1975.  
17 Stephen Hoetzer testified that these channel improvements contained on that exhibit were  
18 actually accomplished while he worked with the State Water Commission. A later document  
19 dated September 10, 1975 (Plaintiffs' Exhibit 283) describes the potential project that is the  
20 subject of the agreement for investigating or surveying it to be one for "channel  
21 improvements". In any event, this earlier agreement was to conduct an investigation and  
22 feasibility study. From Hoetzer's testimony it is evident that finally in 1975, channel  
23 improvements were made from the Lake Irvine control structure to at least U.S. Highway 2, a  
24 distance of one and on-half miles.

25 440. From all of the above, this court finds that until 1975 any channel projects below the Lake  
26 Irvine control structure were simply cleanouts of the channel and not widening or deepening  
27 of it. There is no persuasive evidence that allows this court to make a finding that the project  
28 in 1967 or thereabouts involved a deepening or a widening of the channel. The result of the  
29 1975 channel improvements was to increase channel capacity.

30 441. Another feasibility study was entered into on October 12, 1979. This is evidenced by  
31 Plaintiffs' Exhibit Number 290. The purpose of the study as reflected on page 3 of the  
32 exhibit was to:

33 . . . Develop water surface profiles along Mauvais Coulee and portions of  
34 its tributaries to determine the effect of existing channel conditions and  
structures on selected flows. These water surface profiles will show actual

1        *depth of flow in the channel at these flows, taking into account all*  
2        *backwater due to obstruction in the channel, as well as inadequate bridge*  
3        *or culvert openings.*

4        The location of the project study was to include Big Coulee, portions of its tributaries, from  
5        Lake Irvine to Pelican Lake. The agreement was between the Devils Lake Basin Water  
6        Resource District and the State Water Commission. There was evidence that as a result of  
7        the study actual work was conducted on Big Coulee and that the bridge at U. S. Highway 2  
8        was replaced by the North Dakota Department of Transportation. In addition, culverts  
9        downstream were replaced. (See generally testimony of Cary Backstrand, Trial Transcript,  
10       Volume 5 at 1069-1072). The evidence provided does not support any finding that this  
11       activity constituted actual improvements as compared to maintenance.

12       442. No individual quantitative analysis of any of these projects conducted on Big Coulee (lower  
13       Mauvais Coulee) were provided in any of the testimony. What impact, if any, this had on  
14       the quantity of waters that entered Devils Lake is speculative based on previous and further  
15       findings and conclusions set out in this decision.

16       Stephen Hoetzer testified the channel improvements increased channel capacity. Cary  
17       Backstrand testified the channel projects resulted in the channel being capable of handling  
18       a flow of 400 CFS without flooding adjacent agriculture lands and made the channel "more  
19       efficient".

20       From that it is reasonable to infer that this work from 1975 forward increased the channel  
21       capacity for discharging a greater volume of water into Devils Lake from the Lake Irvine  
22       control structure. But, there was no evidence of what the channel capacity was before the  
23       improvements. And, it does not answer how much additional water actually discharged into  
24       Devils Lake because of the channel improvements to a reasonable degree to find it was a  
25       proximate cause of the plaintiffs' harm and damages. Based on the totality of the findings  
26       set out in this decision, the plaintiffs have failed to prove by a preponderance of the  
27       evidence that these channel improvements previously described separately or together with  
28       other projects was a proximate cause of the damages or taking of their properties claimed  
29       by the plaintiffs.

30       If liability was imposed it would be on the Ramsey County Water Resource District and the  
31       North Dakota State Water Commission based on previous findings.

32       443. The waters that enter Lake Irvine come to it through the chain of lakes primarily from Lake  
33       Alice. Lake Alice has a natural overflow elevation of 1442.5 feet. Steve Hoetzer testified  
34       that Lake Alice is categorized as a type 3 or type 4 wetland, with a depth of three to four  
     feet. In 1961 the State Water Commission issued a permit authorizing the United States

1 Fish and Wildlife Service to maintain a control structure at the outlet location of Lake  
2 Alice. In 1967 the State Water Commission issued a permit to the USFWS to maintain the  
3 outlet structure to an elevation of 1443 feet. It has done so since that time. This *increased*  
4 water storage. Because of the nature of the water flow in the upper basin, the elevations of  
5 Chain Lake and Mike's Lake are necessarily controlled by the elevation existing at Lake  
6 Alice. Therefore, this control structure more likely increased the amount of storage existing  
7 in this part of the upper basin than would otherwise naturally have occurred. There is no  
8 evidence to indicate how much more. However, it is inconsistent with the plaintiffs' theory  
9 of the case.

10 By the control that USFWS maintained over Lake Alice until 1979 it controlled the waters  
11 flowing from all of the watersheds of the upper Devils Lake Basin that discharged waters  
12 through Lake Alice. From 1979 it did so for the St. Jo, Calio, and Mauvais Coulee sub-  
13 basin until 1997. In 1997 waters backing up from Devils Lake inundated the Lake Alice  
14 structure making it inoperable.

15 444. The Lake Alice control structure is not a project that was identified by the plaintiffs or  
16 asserted by them to have contributed to the taking or damage claims against the defendants.  
17 Instead, the plaintiffs maintain that the impact of the Lake Irvine outlet control structure had  
18 an impact on Lake Alice because they claim Lake Alice's elevation was controlled by Lake  
19 Irvine's elevation.

20 445. Relying on the testimony of their expert, Cecelio Olivier, plaintiffs claim that Lake Alice  
21 incurred lost storage of upper basin waters from 1961 to 1997 resulting in water discharge  
22 into Devils Lake in the total amount of 8198 acre feet. (Plaintiffs' Exhibit 332). For  
23 reasons set out herein, this court finds this opinion is not reliable or proven:

- 24 a. For reasons explained in subsequent findings, the plaintiffs' adoption of the  
25 West Report factor of .1865 to calculate lost storage discharge is not  
26 reliable. (See Finding 608).
- 27 b. The USFWS maintained an outlet structure at Lake Alice designed to hold  
28 back more water, not to release more.
- 29 c. The outlet structure was controlled and managed by the USFWS since 1961.
- 30 d. By controlling the level of Lake Alice, the USFWS also defacto controlled  
31 the levels of the other chain of lakes in the upper basin to 1979 and after that  
32 for the waters flowing from Mauvis, St. Joe and Calio Coulees.
- 33 e. This court agrees that for the Lake Irvine control structure to control the  
34 elevation of Lake Alice and lakes above it, the USFWS would have to open

1 the Lake Alice outlet gates. There is no persuasive evidence that this  
2 happened.

3 f. The Y factor used in the formula to calculate cumulative impact of this  
4 project presumes facts not supported by evidence and as explained in later  
5 findings. (See Finding 607).

6 g. Additional calculations used by Olivier to reach the calculations of annual  
7 impact in Plaintiffs' Exhibit 332 have not been explained in a manner  
8 sufficient to analyze or scrutinize them, or otherwise rely on them. (See  
9 Finding 607).

10 446. Even if the evidence in Plaintiffs' Exhibit 332 was reliable along with the expert testimony  
11 relating to it and for the purpose of addressing this issue, it would not be sufficient when  
12 piggybacked onto the contribution asserted by plaintiffs for Lake Irvine itself to be a  
13 substantial part or cause in the harm suffered by plaintiffs. This is based on the following:

14 a. Plaintiff claims waters entering Devils Lake from 1961 to 1997 was  
15 3,866,845 acre feet. Exhibit 332 calculates Lake Alice's contribution to be  
16 8198 acre feet. this constitutes a claimed contribution of only 0.2%.

17 b. .2% contribution added to the claimed contribution of Lake Irvine of 1.87%  
18 only comes to a total of 1.89%. As a part of the whole, this claimed  
19 contribution as a percentage by itself is insufficient to be a substantial part or  
20 cause of plaintiffs' harm, if any.

21 c. When applying this claimed impact of 8198 acre feet against the total inflow  
22 volume into Devils Lake from 1957 through 2005 of 6,000,727 acre feet  
23 asserted by the plaintiffs, the contribution is .13%. Added to 1.21%, this  
24 creates only a 1.34% contribution. This also is insufficient to be a  
25 substantial part or cause of plaintiffs' harm, if any.

26 These possible percentages contributions are extremely low from a factual  
27 standpoint. None of them are sufficient to constitute a substantial part or  
28 cause in bringing about any damages or taking claimed by the plaintiffs. So,  
29 they negate a finding of proximate cause just based on this.

30 d. The USFWS control structure held back more water, not less and the control  
31 structure there controlled the lake elevation. Lake Irvine could not impact  
32 Lake Alice once the structure was put in place.

33 For the reasons set out in this and previous findings, the plaintiffs have not proved this  
34 project by itself or together with the Lake Irvine control structure project was a proximate

1 cause of any damages or taking claimed by the plaintiffs for their properties.

2 447. Notwithstanding this analysis, this court agrees that based on the previous findings that the  
3 Lake Alice control structure was not an identified project. Defendants objected to evidence  
4 related to it in a timely manner. This court allowed the evidence in provisionally. I find that  
5 the Lake Alice Project is not sufficiently connected to the Lake Irvine control structure to  
6 consider the evidence relating to Lake Alice as part of the identified project, Lake Irvine's  
7 control structure. So, that objection should be sustained and that evidence not considered.  
8 None of the defendants are liable for anything arising out of this project. Based on the  
9 evidence set out above, this was a project exclusively completed and maintained by the  
10 USFWS.

11 If liability did exist for this project, liability would be several only for reasons set out in  
12 Findings of Fact 436.

13 448. From the time the Lake Irvine control structure was implemented in 1957 until 1965, Devils  
14 Lake experienced 8 straight years in which the volume of Devils Lake decreased. To 1993 it  
15 increased but fluctuated near the ordinary high water mark during this time. This history is  
16 not consistent with the opinion that this structure and later channel improvements had an  
17 impact on the lake elevation.

18 449. In the early 1970's there were three projects within the Devils Lake basin identified by the  
19 plaintiffs that were initiated by one or more of the defendants. The earliest of these was  
20 probably the channel improvement project between Mike's Lake and Chain Lake. This area  
21 is located in the Calio Coulee sub-basin. The waters from Mike's Lake flow into Chain  
22 Lake under what witness Steve Hoetzer characterized as "normal conditions". He described  
23 Mike's Lake as a shallow lake and a marshy area. It would receive water from not only St.  
24 Joe Coulee, but waters from Dry Lake. In the historical past Mike's Lake has dried up and  
25 the bottom land farmed. According to Hoetzer, because of its condition and normal depth,  
26 he would categorize Mike's Lake as a type 4 or type 3 wetland.

27 450. On December 3, 1971 the North Dakota State Water Commission and the Sweetwater Dry  
28 Lake Water Management District which ultimately was absorbed by the Ramsey County  
29 Water Resource District entered into an agreement to participate in a project to open a  
30 channel between Mike's Lake and Chain Lake at a projected cost of \$34,000.00, although  
31 this also included the cost of a second project. (Plaintiffs' Exhibit Number 93). The  
32 NDSWC agreed to help finance the projects. The amount funded was \$13,600.00. This is a  
33 project that ultimately resulted in the placement of culverts underneath the roadway  
34 between Mike's Lake and Chain Lake. The evidence does not indicate who designed the

project. It is not believed that all of the eight culverts were placed in at the same time, but that half were placed in the early 70's and the other culverts placed in during the 80's at different times. The entire channel was about a quarter mile in length. By helping to fund the project rather than just issuing a permit, the North Dakota State Water Commission together with the Ramsey County Water Resource District would be responsible for this project.

451. The channel improvement relating to Mike's Lake involved the placement of culverts underneath the roadway at that location where water flowed towards Chain Lake. According to the testimony of Cary Backstrand, approximately 8 metal culverts with various diameters but none exceeding 48 inches were placed at that location with flap gates on the north side of the culverts and that this was done beginning in the early 1970's.

The culverts were placed under the roadway and the water flowed through them at the same location where the water otherwise flowed naturally from Mike's Lake to Chain Lake. The flap gates were placed on the culverts for the purpose of preventing back flowing of water from Chain Lake as a result of waters that may have come into the upper basin through the Calio Coulee and Mauvais Coulee into Lake Alice and Chain Lake. No explanation was given of what impact these flap gates had, if any, on increasing the potential of additional water discharging into Devils Lake.

452. No sufficient evidence was presented that quantified the additional waters flowing into Devils Lake because of the project, if any, that would not have otherwise done so. In any event, these culverts are now inundated by the waters from Devils Lake.

453. Whether this was the natural flow route of Mike's Lake through the chain of lakes is disputed. According to the testimony of Cary Backstrand, his observations of the area was that the water flowed towards Chain Lake through this area before the roadway and necessary culverts were placed in it. On the other hand, according to the testimony of Stephen Hoetzer, water from Mike's Lake would flow through another natural channel westwardly directly into Lake Alice. Hoetzer claims that once this other channel was constructed that flow directly to Lake Alice terminated and instead it flowed into Chain Lake. Backstrand indicated that at the turn of the century (1900) such a channel may have existed during high water. He did not believe one existed now. I find Backstrand's testimony more credible in light of his longer experience at the State Water Commission employment and exposure to this project.

454. The plaintiffs assert that Stephen Hoetzer testified that he believed this project lowered the elevation of Mike's Lake. Plaintiffs' Brief at p.59 citing TT Vol. 3 at p.511. However his

1 testimony does not state that. On the other hand, at TT Vol. 7 p.515 Hoetzer states in  
2 response to the question:

3 Q. *And would the channel have an impact on the elevation of Mikes Lake or*  
4 *Chain Lake?*

5 A. *No, it would not.*

6 There is not sufficient evidence in the record to substantiate that any work done on the  
7 channel between Mikes Lake and Chain Lake lowered the elevation of Mike's Lake. To the  
8 contrary, Stephen Hoetzer testified it did not lower the lake level, but merely avoided the  
9 springtime flooding of adjacent land by improving channel capacity. Further, he also  
10 acknowledged that the benefit of the channel project was questionable to the extent that the  
11 engineers even referred to it as "humorous". He admitted the project did not work.

12 455. Ultimately, this entire area of these channel improvements between Chain Lake and Mike's  
13 Lake became flooded and inundated by the waters of Devils Lake. But, it never did  
14 function as any kind of impacting project. Originally, Stephen Hoetzer acknowledged that  
15 the project at its inception had no hydrologic effect. In later testimony during his cross  
16 examination, he attempted to minimize that characterization. Hoetzer acknowledged that  
17 the project did not work and was basically "symbolic". (Trial Transcript Volume 4 at  
18 p.870-871). He agreed it did not work.

19 There is no other sufficient evidence that might otherwise establish this project by its design  
20 or function contributed substantially or nominally to the increased elevations experienced  
21 on Devils Lake or even improved channel capacity.

22 Based on this and the previous and subsequent findings, I find there is insufficient evidence  
23 that the channel improvement projects between Mike's Lake and Chain Lake adversely  
24 contributed to the increased water elevations of Devils Lake as claimed by plaintiffs. It has  
25 not been proven this project had any impact. Plaintiffs have failed to establish that this  
26 channel improvement project was a proximate cause of any harm or damages incurred by  
27 the plaintiffs either by itself or in combination with other projects. For reasons set out  
28 herein and in subsequent findings, the opinion of the plaintiffs' expert does not reliably  
29 persuade this court as a fact finder to determine otherwise.

30 456. In the summer of 1974 construction began on a project to improve the channel of Calio  
31 Coulee. This project was in the Calio Coulee sub-basin. The location of the channel  
32 improvement was a five mile length of Calio Coulee from approximately the section line of  
33 Section 33, Township 157 North, Range 65 West in Towner County, north into Section 9  
34 approximately 5 miles. This was in Coolin Township.

1 Original construction plans called for a more ambitious project. However, because of costs  
2 proposed and the low availability of funds the project was reduced and the channel  
3 improvements redesigned. This is manifested by internal memos of the North Dakota State  
4 Water Commission, including Plaintiffs' Exhibit 124, the project description in Plaintiffs'  
5 Exhibit 122, Plaintiffs' Exhibit 121, Plaintiffs' Exhibit 115 (which is a duplicate of  
6 Plaintiffs' Exhibit 124), and Plaintiffs' Exhibit 114.

7 457. It was the Towner County Water Resource District that applied for the permit from the  
8 North Dakota State Water Commission to commence this project and also to receive some  
9 funds from the State Water Commission to accomplish the work. Work was initiated and it  
10 appears that the project was completed as evidenced by a letter from the Towner County  
11 Water Management Board dated December 2, 1974 indicating both completion and that the  
12 project came in \$35,000.00 under the cost estimate. (Plaintiffs' Exhibit 126).

13 458. The Calio Coulee Channel Improvement Project drains an area of approximately 140 square  
14 miles out of a total of 233 square miles in this sub-basin. The purpose of the project was to  
15 allow for more rapid draining of water from adjacent lands of the coulee during the spring  
16 and growing season to bring it more quickly into the Calio Coulee and then downstream.

17 459. A description of the project was evidenced from both the testimony of Stephen Hoetzer as  
18 well as the exhibits referred to above. Although the description of the work obviously  
19 would have resulted in a partial cleanout of the coulee through this area of the channel, it  
20 also included improvements both by widening and deepening the channel. For example,  
21 almost 300,000 cubic yards of excavation were required for the improvements made to  
22 Calio Coulee at this upstream location.

23 460. Besides issuing a permit, the North Dakota State Water Commission participated in the  
24 project in terms of approving the design of it and helping to fund it. The entities that are  
25 subject to liability for this project, if any at all, would be the Towner County Water  
26 Management District and the North Dakota State Water Commission.

27 461. Based upon the improvements made to the Calio Coulee along this five mile area of the  
28 channel, it allowed for water to drain more quickly into the channel and ultimately into  
29 Chain Lake.

30 However, except as hereafter noted, there is insufficient evidence to indicate what happened  
31 with this water once it entered this part of the chain of lakes. As already recognized, as the  
32 water in the upper basin drains, it naturally seeks its way into Devils Lake. Once this water  
33 entered Chain Lake it would naturally flow through channels into Lake Alice and then into  
34 Lake Irvine. Then it had to enter into Big Coulee through Pelican Lake before any portion

1 of it discharged into Devils Lake. An overview of the evidence shows that this entire route  
2 in the upper Devils Lake Basin and the flow of water through it was from time to time  
3 impeded or obstructed at different locations due to channel obstructions including  
4 roadways, clogged and silted channels, outlets inadequate to readily discharge water and  
5 channels inadequate to receive all the discharging water. These particular channel  
6 improvements only constituted a small portion of the entire Calio Coulee. The  
7 improvements were even a smaller portion of the entire route this water had to flow through  
8 to discharge into the Devils Lake. So, it is still left to question what became of this water  
9 which moved more rapidly through this short distance of improved channel. That is, did it  
10 move through in greater quantity and discharge into Devils Lake or instead was a  
11 comparable portion of it held back, evaporated, or absorbed at some other location because  
12 of obstructions, outlets or channels that restricted or impeded its flow?

13 Even recognizing that these channel improvements would allow water entering the channel  
14 at this point to drain and move more quickly through this area of the basin, it still does not  
15 provide a reasonable evidentiary basis to determine how much more water, if any more at  
16 all, actually discharged into Devils Lake due to this project by itself or in combination with  
17 other projects. There is no sufficient evidence this project manufactured more water.

18 Subject to obstacles and impediments downstream, this project might have the potential to  
19 move since additional volumes of water towards Devils Lake. However, there has been no  
20 evidence that directly quantified any contribution that this particular project had to the  
21 increased water levels of Devils Lake compared to if this project had not been implemented.  
22 Even though this court does not expect an exact figure, for reasons set forth above there are  
23 still concerns held by this court as a fact finder about the impact, if any of this project. For  
24 reasons set out in subsequent findings, the opinion of plaintiffs' expert does not reliably  
25 answer these evidentiary concerns for this project. So this trial court is not satisfied based  
26 on this and previous and subsequent findings that proximate cause has been proven as it  
27 relates to this project separately or in combination with others.

28 462. Another part of the channel improvements on Calio Coulee above Chain Lake and the Calio  
29 Coulee sub-basin included work on what is what is described as the collector drain. This  
30 was a project that occurred on Calio Coulee immediately below the channel improvements  
31 previously described. It was located in Ramsey County. It was a project which both  
32 Towner County Water Management District and the Sweetwater-Dry Lake Water  
33 Management District (the predecessor to the Ramsey County Water Resource District)  
34 sought permit from the State Water Commission which was ultimately granted. The project

1 resulted in the excavation of approximately 458,000 cubic yards of soil.

2 463. The defendants argue that this project, the collector drain, was not an identified project.  
3 (See for example Post Trial Reply Brief of Benson, Cavalier, Pierce, Rolette and Towner  
4 County Water Resource Districts at p.16). However, the complaint as a pleading document  
5 identified as a project, "Calio Coulee channel improvements above Chain Lake".  
6 (Plaintiff's Amended Complaint at ¶356). This was sufficient notice placed on the  
7 defendants by the pleadings. There is no evidence that this project was not identified by the  
8 plaintiffs in discovery or otherwise. Consequently, this court is satisfied that it should be  
9 considered as one of the Calio Coulee channel improvement projects above Chain Lake.

10 464. The project as it is described in Plaintiffs' Exhibit 122 began in Section 1 of Chain Lake  
11 Township in Towner County and angled to the northeast to Section 5 in the De Groat  
12 Township and then east a distance of approximately 3 miles. The area from Section 5 and  
13 east three miles drains approximately 53 square miles or 1.6% of that part of the basin that  
14 drains into Devils Lake. The project describes the channel under the modified plan to be  
15 four feet deep at all points and to be 30 feet wide upstream to 100 feet wide for the lower  
16 part of the channel. It would involve excavating 458,000 cubic yards of soil. This project  
17 was accomplished around 1972 at some time before the Calio Coulee improvements in  
18 Towner County. The North Dakota State Water Commission agreed to help finance this  
19 project.

20 465. It is reasonable to infer that by the work done on this project, it improved the draining of  
21 water from this area along Calio Coulee so that the coulee's adjacent land drained more  
22 quickly, thereby reducing flooding more quickly, particularly in the spring. Subject to  
23 obstacles and impediments downstream, the project would have the potential to move some  
24 additional water towards Devils Lake. However, there is no evidence that quantified any  
25 contribution that this particular project had to the increased water levels of Devils Lake  
26 compared to if this project had not been implemented.

27 Again as with the Calio Coulee project, this work was only a small part of the entire length  
28 of the Calio Coulee. It was even a smaller part of the entire route water entering or flowing  
29 through this location passed through before discharging into Devils Lake.

30 Even recognizing that this improvement would allow water to discharge into and move  
31 more freely through this point, it still fails to reasonably answer the question of how much  
32 more water discharged into Devils Lake because of this project by itself or even in  
33 combination with other projects. The same concerns and questions cited in the findings  
34 relating to the other Calio Coulee project apply to this one, also For reasons set out in

1 subsequent findings, the opinion of the plaintiffs' expert does not reliably answer these  
2 concerns or questions. Based on all the above, plaintiffs have not proved that this project  
3 by itself or in combination with others was a proximate cause of any damages or taking of  
4 their property claimed by the plaintiffs..

5 466. The Towner County and Ramsey County Water Resource Management Districts would be  
6 subject to liability, if any as to this project. The State Water Commission would also be  
7 subject to liability due to its financing of the project.

8 467. The plaintiffs claim that a control structure serving as an outlet to Lake Ibsen constituted a  
9 project that impacted the lake elevations of Devils Lake and caused damages to the  
10 plaintiffs. Lake Ibsen is located on Little Coulee below Hurricane Lake and above Silver  
11 Lake. It is south of U.S. Highway 2. Ultimately, the waters flowing from Little Coulee  
12 enter into Big Coulee and then discharge into Devils Lake.

13 468. Lake Ibsen is a lake that is approximately 13 acres in size. It is located in Benson County.  
14 It is also located within the Little Coulee sub-basin. It is considered a meandered lake.  
15 Steve Hoetzer described this as a type 4 or type 5 wetland. At least by 1970 area farmers  
16 were expressing concerns to the Benson County Water Management District and then to the  
17 State Water Commission relating to flooding of their lands adjacent to Lake Ibsen. As a  
18 consequence, a dialogue was initiated between the State Water Commission, the Benson  
19 County Water Resource District, the area farmers, and the North Dakota State Game and  
20 Fish Department regarding the levels of Lake Ibsen.

21 Even earlier discussions in 1969 resulted in channel cleanout. These subsequent  
22 discussions in the 1970's resulted in a decision to construct a control structure at the outlet  
23 of Lake Ibsen as it entered back into Little Coulee.

24 469. The control structure was designed by the North Dakota State Water Commission by one of  
25 its engineers, Stephen Hoetzer. The structure was located in the southeast corner of the lake  
26 and included a steel sheet piling weir. The total width of the structure was 58 feet 8 inches.  
27 The weir section was 30 feet 8 inches. It was constructed across the outlet channel of Lake  
28 Ibsen. The two entities involved in the design and construction of the control structure was  
29 the North Dakota State Water Commission and the Benson County Water Resource  
30 District. Subsequent to its construction it was the Benson County Water Resource District  
31 that managed it.

32 470. The meander elevation of Lake Ibsen or any lake is a factor to consider in determining  
33 outlet elevation. However, it is typically not the outlet elevation. A meander line is  
34 determined by starting usually at a section line on the lake's edge and then by plotting out

1 points by meets and bounds or bearings in a survey; from this method a meander line is  
2 established around the lake. Each point on the plot is a meander corner.

3 A meander line is established on dry land. Meander corners are set at "convenience" points  
4 to allow the surveyor to set the survey stake away from the water's edge, cattails etc.  
5 Consequently, the water's edge is typically below the meander line, at times significantly.  
6 At times this is even stated in the surveyor's notes. Consequently, whenever a meander line  
7 is established, it can only serve as an approximation of the body surface's elevation at the  
8 time the survey is done. So a meander line is determined to a great extent by the water in  
9 the lake being surveyed at that time.

10 Further, a meander line is intended to serve as a property rights line thereby defining rights  
11 of landowners down to the meander line. The lakes of the Devils Lake Basin were surveyed  
12 in the 1800's when the government decided to retain ownership of the lakes in the state.

13 A meander line and its elevation is not the outlet elevation. The outlet elevation of a body  
14 of water is the flow point at statehood (1889) when water from the lake would start to flow  
15 from the lake to a stream or other body of water downstream. As indicated, a factor in  
16 determining outlet elevation is the meander line elevation. Other factors considered are the  
17 historical lake levels, topographical maps, topographical surveys and site visits.

18 471. When the control structure was being designed, it was originally decided that the outlet  
19 elevation level for Lake Ibsen would be 1490 feet msl. Consequently, water was to be held  
20 behind this control structure to that elevation. All of the parties initially agreed to this. A  
21 contract was entered between the parties for the construction of the project on May 7, 1974.  
22 When it was ultimately built the control structure elevation was 1489.5 feet. This elevation  
23 for the control structure was used because after it was initially calculated that the meander  
24 line of the lake was 1490.5 feet msl, it was later determined that there had been an error in  
25 that calculation. (See Defendant's Exhibit 2244). The State Water Commission then  
26 recalculated the meander elevation and found it to be 1489.52 feet msl. This was almost  
27 one foot lower than the original meander level elevation and one-half foot lower than what  
28 had originally been agreed upon in the 1970 agreement.

29 472. The plaintiff's expert witness, Cecelio Olivier concluded that the natural outlet elevation of  
30 Lake Ibsen was 1490.5 feet msl. The defendants assert that the pre-project elevation or  
31 natural outlet elevation was 1489.5 feet msl. For reasons set forth below this court finds  
32 that there is insufficient evidence to conclude that the natural outlet elevation of Lake Ibsen  
33 is 1490.5 feet msl as claimed by plaintiffs. It is more likely that the corrected calculation  
34 made of 1489.5 feet msl is the natural outlet elevation, if not less. This is based upon the

1 following:

- 2 a. An employee of the North Dakota State Water Commission, C.P. Nelson, a  
3 draining engineer discovered an error in the original calculation of the  
4 meandered acreage of Lake Ibsen. He calculated the correct meander  
5 elevation to be 1489.52 feet msl. (See Defendant's Exhibit 2244).
- 6 b. Since this recalculation, there has been no other calculation brought forward  
7 to show that this determination was in error.
- 8 c. The original calculation of the spill elevation of Lake Ibsen was  
9 approximately 1488.5 feet and also served as the best estimate of the  
10 probable meander level. (Plaintiffs' Exhibit 82 and 84). So, it was  
11 concluded originally that the best estimate of the meander elevation was  
12 1489 feet msl. (Plaintiffs' Exhibit 84). The meander elevation is typically  
13 higher than true outlet elevation of a lake, but in any event is subject to when  
14 the survey is done. For example, in a survey done in 1970, the meander  
15 elevation was calculated at 1491.3 to 1492.4 feet. *Id.*
- 16 d. The North Dakota State Game and Fish Department was of the opinion that  
17 1490 feet msl would serve its interests if that constituted the top of the  
18 permanent outlet control structure for Lake Ibsen. (Plaintiffs' Exhibit 84).
- 19 e. All of the original agreements thereafter that establish 1490 feet as the outlet  
20 level for the control structure were simply that, agreements. There was no  
21 specific finding that 1490 feet was in fact the natural outlet elevation.
- 22 f. There is no survey that has been introduced into evidence or a reference to a  
23 survey that established 1490 feet or even 1490.5 feet to be the natural outlet  
24 elevation.
- 25 g. One of the plaintiff's James Wang, acknowledged that in a letter he wrote on  
26 behalf of the Benson County Water Resource District as their attorney  
27 (Defendant's Exhibit 4028) (and this court being satisfied that he was  
28 familiar with the control structure project) that the Lake Ibsen elevation was  
29 between 1489.5 feet and 1489.65 feet. This constitutes an admission.
- 30 h. Based upon all the above, this Court is of the determination that the use of  
31 1490.5 feet as a means of calculating the natural outlet elevation for Lake  
32 Ibsen is erroneous and would create flawed calculations. The more likely  
33 elevation for the outlet of Lake Ibsen is 1489.5 feet or less.

34 Based on the above, the control structure at Lake Ibsen is not holding back less water than

1 would have naturally been held back by the topography of the lake and surrounding area. It  
2 is likely holding back more water.

3 473. In April of 1975 the North Dakota State Water Commission and the Benson County Water  
4 Resource District entered into a contract with a contractor to build a concrete spillway at the  
5 outlet of Lake Ibsen, together with two miles of downstream channel improvement.  
6 (Plaintiffs' Exhibit 92). This outlet structure was to control Lake Ibsen to the "meander  
7 level of 1489.5 within the limits of spillway and channel outlet capacity for discharge of  
8 excess runoff". *Id.* The estimated cost of the project was \$62,000.00. The spillway and  
9 outlet structure were then constructed.

10 474. Although Stephen Hoetzer testified that there was a reduction in the amount of flooding  
11 around Lake Ibsen after the improvements, this is contrary to other evidence that is more  
12 persuasive. According to Dale Frink of the State Water Commission, there were complaints  
13 received immediately after the structure was built of landowners being flooded adjacent to  
14 the lake. Flood easements were acquired by the Benson County Water Resource District  
15 from adjoining landowners, which easements were designed to among other things, back  
16 water over, submerge or otherwise flood adjacent lands of Lake Ibsen. Both Stephen  
17 Hoetzer and Cecelio Olivier acknowledge that flood easements are acquired when water is  
18 being held back above the natural elevation of a water body. Considering all of the above,  
19 this court determines that the evidence does not support a finding that the construction of  
20 this outlet and the spillway elevation set at 1489.5 feet resulted in a draw down of water  
21 from Lake Ibsen below its natural outlet elevation and a loss of storage capacity as a result.  
22 The evidence is more persuasive that the opposite occurred, that more water was held back.  
23 This by itself results in a finding that plaintiffs have not proved that this project was a  
24 proximate cause of any damages or taking claimed by the plaintiffs.

25 475. It is the opinion of plaintiffs' expert, Cecelio Olivier, that the Lake Ibsen control structure  
26 which had an outlet elevation of 1490 feet resulted in the project contributing 9437 acre feet  
27 of water into Devils Lake from 1975 through 2005. For reasons set forth below and from  
28 other findings in this decision including those stated above, I find that this impact claimed  
29 by the plaintiffs is unreliable. It is an additional basis supporting the determination that  
30 proximate cause has not been proved.

31 a. For reasons explained in subsequent findings, the plaintiffs' adoption of the  
32 West Report, .1865 factor to calculate lost storage discharge is unreliable.  
33 (See Finding 608).

34 b. Certain facts assumed by Olivier in making this calculation are not correct.

1 The evidence does not support a determination that the natural outlet  
2 elevation was 1490.5 feet. Rather, it was 1489.5 feet. In addition,  
3 inconsistent with Olivier's opinion, flood easements were acquired thereby  
4 indicating additional storage, not less.

5 c. The Y factor used in the formula to calculate the cumulative impact of this  
6 project presumes facts not supported by the evidence and as explained in  
7 later findings. (See Finding 607).

8 d. Additional calculations used by Olivier to reach the calculations of annual  
9 impact in Plaintiffs Exhibit 336 have not been explained in a manner  
10 sufficient to analyze or scrutinize them or otherwise rely on them. (See  
11 Finding 607).

12 476. To prove inverse condemnation the property owner must prove that a public entity took or  
13 damaged his or her property for a public use and that public use was a proximate cause of  
14 the damage. Knutson v. City of Fargo 2006 N.D. 97 ¶9 714 N.W. 2d 44. Further, that cause  
15 must have been a substantial part in bringing about the damages or taking. Beilke by Beilke  
16 v. Coryell, *supra* at p. 610.

17 Giving the benefit of the doubt to the plaintiffs for the purpose of addressing this issue, the  
18 contribution they claim was experienced from the Lake Ibsen project of 9437 acre feet  
19 would not be a substantial part in bringing about any damages or taking claimed by them.  
20 The plaintiffs presented evidence through its expert witness, Cecelio Olivier, that in his  
21 professional opinion this project and structure contributed to waters entering Devils Lake  
22 and increasing the lake's elevation more than would have otherwise done so. The plaintiffs  
23 through their expert witness, Cecelio Olivier, opined that the amount of runoff or water  
24 flowing into Devils Lake because of lost storage from the Lake Ibsen project from 1975  
25 through 2005 was 9,437 acre feet. (Plaintiffs' Exhibit 336). Mr. Olivier opined in this same  
26 time period the total water which flowed into Devils Lake because of all of these projects  
27 constituted 5,051,616 acre feet.<sup>4</sup> He opined this would constitute .19% of the total  
28 contribution into the lake from all sources. But, Olivier claims the impact of these projects  
29 go back to the 1957 Lake Irvin project. If this claimed impact of 9,437 acre feet was applied  
30 to the entire time period plaintiffs claim the 15 projects impacted the lake elevations, 1957  
31 to 2005, the percentage of impact is even less. 9437 acre feet is only .15% of 6,000,727 acre  
32

33 <sup>4</sup> Mr. Olivier testified that although this number was part of their  
34 calculations reflected on Defendant's Exhibit 2242 prepared by EOR, his  
company, he was not certain how these numbers for this particular project were  
computed.

1 feet.

2 These possible percentage contributions of .15% or .19% are extremely low from a factual  
3 standpoint. None of these percentage contributions would constitute a substantial part or  
4 cause in bringing about any damages or taking claimed by the plaintiffs.

5 477. Even if the benefit of the doubt is given to the plaintiffs so that liability arguably attached,  
6 N.D.C.C. 32-03.2-02 would require the application of several liability only. This is because  
7 from a factual standpoint there is a reasonable basis for determining the contribution of this  
8 project at Lake Ibsen to any harm suffered by the plaintiffs in terms of any damages or  
9 taking of their property. Therefore, to the extent that the North Dakota State Water  
10 Commission and the Benson County Water Resource District are subject to any liability, it  
11 would only constitute between .15% to .19% of any damages awarded to plaintiffs if using  
12 plaintiffs' time period 1975 through 2005.

13 478. The plaintiffs claim that projects relating to Hurricane Lake resulted in increased waters  
14 discharging into Devils Lake that would not have otherwise done so but for the project.  
15 Hurricane Lake is in the Little Coulee sub-basin. (Also referred to as Hurricane Lake  
16 watershed). It is located partly in Pierce County and Towner County, and is located on the  
17 Little Coulee above U.S. Highway 2.

18 479. Hurricane Lake is a meandered lake. In 1885 Pierce County surveyed its portion of the lake.  
19 Four years later Towner County surveyed its portion of the lake, but that portion was not  
20 meandered. In 1885 Hurricane Lake's meandered area was calculated to be 1838.4 acres.  
21 The lake typically had a water depth of four feet. However, in 1927 the lake went dry and a  
22 district court directed that the meandered portion of Hurricane Lake be divided among  
23 adjacent landowners. There were other time periods in its history that this lake became  
24 completely dry. Steve Hoetzer testified that this lake would be categorized as a type 4  
25 wetland.

26 480. In 1969 the Pierce County Water Management District solicited the North Dakota State  
27 Water Commission to study the feasibility of stabilizing the level of Hurricane Lake to  
28 prevent flooding on private lands. (Plaintiffs' Exhibit 50). In 1974 the State Water  
29 Commission published a report with alternative plans after an earlier plan was met with  
30 dissatisfaction by area landowners. Apparently, these landowners wanted to drain the entire  
31 lake. In its 1974 report (Plaintiffs' Exhibit 51) the State Water Commission set out four  
32 alternative plans. Those plans varied from maintaining the lake at its natural elevation to  
33 entirely draining the lake. On August 2, 1976 Vern Fahy, the North Dakota State Engineer,  
34 provided a final determination and summary (Plaintiffs' Exhibit 52). In that summary the

1 State Engineer denied the request for complete drainage of Hurricane Lake. *Id.* In making  
2 that determination the report stated:

3 *Hurricane Lake is recognized as a valuable detention reservoir for the*  
4 *storage of floodwaters, a shallow lake/marsh beneficial for waterfowl and*  
5 *wildlife, and a recreation/hunting area. However, it is also recognized as*  
6 *an area where frequent flooding of agricultural lands has recently occurred.*  
7 *Therefore, the lowering of the lake outlet to 1548.5 msl (under the*  
8 *conditions herein described) plus the cleaning and clearing of the outlet*  
9 *channel is hereby authorized.*

10 As a consequence of this the North Dakota State Water Commission and the Board of  
11 Commissioners of the Pierce County Water Management District entered into an agreement  
12 on December 21, 1976 to construct a control structure on Hurricane Lake. The State Water  
13 Commission agreed to perform and/or supervise all work necessary for the completion of the  
14 project. Thereafter, the water resource district was to operate and maintain the Hurricane  
15 Lake Control Structure.

16 Pursuant to that agreement, Steve Hoetzer who was then employed at the North Dakota State  
17 Water Commission, designed a control structure consisting of a sheet metal weir to be  
18 located at the southern outlet of Hurricane Lake. This outlet structure was constructed. In  
19 addition, outlet channel improvements were completed from the structure to the section line  
20 road between sections 30 and 31. However, no channel improvements were made beyond  
21 that section line road.

22 481. The control structure was designed and built with a control elevation of 1548.5 feet msl. It  
23 was constructed as an outlet for Hurricane Lake about December of 1976. By constructing  
24 the outlet at this elevation, it lowered the natural outlet elevation. Prior to the project, in  
25 1972 a drainage engineer, Phil Nelson, established the meandered elevation of Hurricane  
26 Lake at 1550.35 feet. This was based upon the US Geological Survey Quadrangle Map and a  
27 meandered area of 1838.4 acres from the original plats of the lake area. (See also Plaintiffs'  
28 Exhibit 10).

29 482. Another survey done in September of 1974 addressed the natural outlet elevation. That  
30 survey concluded that the natural outlet elevation was 1549.5 feet. This is consistent with a  
31 recognition that the meandered elevation of the lake is generally considered to be above the  
32 outlet elevation. It is consistent with the topographical lines set out on Plaintiffs' Exhibits  
33 11, 22, and 27. There is no other evidence to support a different natural outlet elevation. I  
34 find that 1549.5 feet was the more likely natural outlet elevation of Hurricane Lake.

483. By establishing the outlet elevation for the control structure at 1548.5 feet the State Engineer  
essentially agreed to lower the outlet elevation by approximately one foot. Depending on the

1 water budget of any given year and channel conditions and the status of channel  
2 improvements, this would have the potential to cause some greater amount of water to  
3 discharge into Devils Lake.

4 484. Even after the outlet structure was constructed and became operational, it still did not  
5 effectively function to actually lower the lake's elevation to 1548.5 feet for a significant  
6 period of time. This is because poor channel capacity impacted the ability of an outlet  
7 control structure to properly function as designed. Even the plaintiffs' witness, Steven  
8 Hoetzer, acknowledged this. (Defendants' Exhibit 4039, p.2). Not all of the downstream  
9 channel was ready to handle the outlet discharge. In the fall of 1976 there were channel  
10 improvements done extending 7200 feet downstream. However, other obstacles further  
11 downstream in the unimproved parts of the channel, including the section line roadways,  
12 obstructed channel flow to such an extent that these obstructions held water back to a level of  
13 at least 1550 feet before any outflow occurred from the lake. Consequently, for several years  
14 after 1977 the control for the elevation of Hurricane Lake was not at the outlet structure, but  
15 at the section line roadways, especially between Sections 31 and 32 in Springfield Township.  
16 As a result, the lake level required before outflow could occur was at least 1550 feet.  
17 (Defendant's Exhibit 2245).

18 Channel improvement plans for the project support this. Plaintiffs' Exhibit 10 is a plan dated  
19 1-14-82. It indicates in notations by the consulting engineer that there were channel  
20 improvements done from station 312+50 to 257+00 in 1976. This is the area of the channel  
21 from the outlet to a short distance downstream of the Section 30/31 roadway. However,  
22 Plaintiffs' Exhibit 4, channel improvement plans dated 5-24-84 notes that, "*previous channel*  
23 *construction ended at 169+80. No construction has been completed between station 169+80*  
24 *and station 226+50 upstream. This is the only area of proposed construction.*" This is the  
25 channel area from the section line roadway between Section 32, Township 157 North Range  
26 68 West and upstream about half way to station 257+40. It includes in that stretch the section  
27 line roadway area between Sections 31 and 32 in Township 157 North, Range 68 West. (See  
28 Plaintiffs' Exhibit 4). On Plaintiffs' Exhibit 4 it indicates in another notation this, "*8-1-88*  
29 *MHG as built 1988 construction season.*" It is reasonable to infer from this that these plans  
30 set out in Exhibit 4 for channel improvements were not accomplished until August of 1988.  
31 It is also supported by Plaintiffs' Exhibit 462 in the supplement document of December 1981.  
32 On Page 6 of attachment A at Item A (Ordinary High Watermark) it states:

33 "*On the day of the site inspection, professional surveyors with the*  
34 *Department of the Interior surveyed using benchmarks, the surface water*  
*elevation of Hurricane Lake at 2 locations. The surface water elevation on*

1        *the south side of the township road crossing the northern part of the lake*  
2        *was 1558.45; and the surface elevation was 1551.40 in the drainage*  
3        *channel located at the township road south of the lake. . . ."*

4        The date of the state inspection was April 27, 1981. *Id.* The Attachment A also states:  
5        *"about 1 mile of the 7 mile channel was completed in 1976. The proposed*  
6        *water control structure would lower Hurricane Lake from elevation 1551.1*  
7        *feet (normal surface water elevation) to elevation 1548.5." Id. at p.2*

8        At 1551.1 feet the surface elevation of Hurricane Lake is five feet. *Id.* at p.3.

9        485. Several years passed before these channel improvements and culverts were placed under the  
10       roadway. This work was finally done in 1988. Prior to that happening, the Hurricane Lake  
11       Joint Water Resource Board was established on March 11, 1982 when the Benson County  
12       Water Resource District, Pierce County Water Resource District, Rolette County Water  
13       Resource District, and the Towner County Water Resource District entered into the  
14       agreement to establish this new separate legal entity. (See Defendant's Exhibit 4038,  
15       Attachment A-1). The HLJWRB is not and never was a party to this action.

16       486. After the creation of the new Hurricane Lake Water Resource District, efforts were renewed  
17       to make improvements to the Hurricane Lake Outlet Channel. These improvements, among  
18       other things included efforts to clean, scrape and dig out the channels for improved channel  
19       flow. This effort was interrupted by an injunction by the United States District Court on  
20       November 30, 1983 in civil case number A2-81-178 in which the State of North Dakota et al  
21       were plaintiffs and the United States Fish and Wildlife Service and US Department of  
22       Interior were the defendants. This litigation arose because the USFWS had acquired  
23       easements on certain properties in Benson and Towner Counties through which the channel  
24       flowed. There was a concern that the channel improvements would disrupt the wetlands on  
25       which the easements existed and do harm to them. Ultimately, the matter was resolved with  
26       a settlement reached between the US Fish and Wildlife Service and Department of the  
27       Interior, and the Hurricane Lake Water Resource Board. That agreement was executed on  
28       December 16, 1987. (See Defendant's Exhibit 4056). Consequently, significant time passed  
29       between the construction of the outlet structure and the channel improvements that allowed  
30       for the outlet structure to function as originally intended.

31       487. The channel improvements were originally limited to 7200 feet from the outlet structure.  
32       This occurred in the fall of 1976 and approximately 38,400 cubic yards of material were  
33       excavated. (See Plaintiffs' Exhibit 59 and Plaintiff Exhibit 462). At this location the channel  
34       was improved to have a bottom width of 20 feet. In August of 1979 plans were made to  
     make additional channel improvements, including placing culverts of appropriate size at the  
     section line roads. In 1982 additional channel improvements were made for another 27,400

1 feet of the channel, though the exact location of these improvements is not clear. This  
2 involved the excavation of 90,000 cubic yards. (See Plaintiffs' Exhibit 59). Then, in 1988,  
3 more channel improvements were made and the outlet structure was widened. It was not  
4 until that time that the Hurricane Lake control structure was able to function as originally  
5 intended, that is to lower the lake to 1548.5 feet. (See testimony of Stephen Hoetzer.) By  
6 that time the Hurricane Lake Joint Water Resource District was responsible for any adverse  
7 impact.

8 488. By the time the channel improvements were completed and the outlet structure was capable  
9 of functioning as designed, the HLJWRD had become the entity responsible for these  
10 projects. So, any liability arising out of them would attach to it and not to any of the  
11 defendants. In addition, by the facts established proximate cause has not been proven. The  
12 plaintiffs have not quantified the impact the channel improvements had, if any, in terms of  
13 water volume discharging into Devils Lake that would not have otherwise done so but for the  
14 projects. No evidence has been presented showing prior channel capacity. So, although there  
15 were improvements and these improvements would have the potential of causing a greater  
16 volume of water move more quickly and in some volume to discharge into Devils Lake, it has  
17 not been sufficiently proven that the channel improvements separately or in combination with  
18 other projects discharged water volumes into Devils Lake because of the projects of sufficient  
19 quantity to find proximate cause established and thereby impose liability. These two reasons  
20 alone preclude the imposition of liability on any of the named defendants.

21 489. The original weir outlet control structure was 9.4 feet wide. In 1988 it was expanded to 20  
22 feet to increase its efficiency. When he was an employee at the North Dakota State Water  
23 Commission, Stephen Hoetzer designed the original outlet control structure. By June of 1987  
24 he was employed with American Engineering. He was retained by the district to continue  
25 work on the project. He prepared a drawing to expand the weir and control structure to 20  
26 feet in width. As he explained in his preliminary drawing (Plaintiffs' Exhibit 68) the basic  
27 idea was:

28 *"to install stop logs between elevations 1548.5 and 1549.5 msl and widen the*  
29 *control structure 20 feet at elevation 1549.5 msl. The weir is being widened*  
30 *to maintain the same flow characteristic as the weir presently has. The weir*  
31 *will control flows between elevations 1549.5 and 1550.9 msl. At elevation*  
*1550.9 msl the outlet channel becomes the controlling factor." Id.*

32 490. The plaintiffs claim that there was a one time draw down of Hurricane Lake causing between  
33 1929 acre feet of water to 4159 acre feet of water to discharge into Devils Lake. Originally  
34 the plaintiffs' expert, Cecelio Olivier, claimed that this occurred in 1977. When other

1 evidence did not support this he later testified the draw down occurred in 1976. However,  
2 more persuasive evidence is inconsistent with that conclusion. This is based upon the  
3 following:

- 4 a. The USGS records for flow on the Little Coulee below Hurricane Lake was  
5 4.2 acre feet in 1977 and 28.6 acre feet in 1978. This is inconsistent with a  
6 draw down as originally claimed by the plaintiffs for 1977.
- 7 b. Stephen Hoetzer who worked on the project originally could not recall if  
8 there was a draw down, then testified that during construction phase there  
9 was a draw down of Hurricane Lake. Finally, on recross examination after  
10 his memory was refreshed from his deposition, this witness acknowledged  
11 that water was not a problem when the weir was constructed and that there  
12 may not have been any draw down to facilitate installation of the control  
13 structure.
- 14 c. Plaintiffs' expert, Cecelio Olivier, maintained there was a draw down in  
15 1976, but he originally testified it occurred in 1977. After he acknowledged  
16 that the flow records did not support that for 1977 or thereafter, he changed  
17 his opinion to this only when confronted with this conflicting evidence.  
18 Further, he based it on FWS data of a lake elevation reading in May of 1976  
19 of 1552.3 feet and a reading in October of 1976 of 1550 feet. However, he  
20 had no knowledge of how much water left the lake through natural process  
21 or on a year to year basis. Consequently, the court agrees that his testimony  
22 and his final conclusions as it relates to this issue is unreliable as part of the  
23 basis of any opinion.
- 24 d. The evidence as previously noted established that the weir when first  
25 constructed did not function as designed because of the downstream channel  
26 obstructions, particularly of the section line roadways. (Defendant's Exhibit  
27 2245). This continued until 1988. So, until 1988 the water level was  
28 retained one and one-half feet above the top of the weir. *Id.*

29 491. The control structure included the placement of stop logs to help control elevation. The  
30 plaintiffs rely on the presumption that after 1988 and into 2005 the stop logs were never in  
31 place. This is not supported by the evidence. The only evidence regarding this issue is  
32 Stephen Hoetzer's testimony that indicates that when he visited the site on July 8, 2006 the  
33 stop logs were in place. There is no other evidence other than plaintiffs' expert's own  
34 conclusions that the stop logs were not in place. With insufficient evidence that the stop logs

1 were not in place, it makes the analysis by plaintiff's expert, Cecelio Olivier, regarding  
2 Hurricane Lake far less reliable.

3 492. The plaintiffs through the testimony of their expert witness, Cecelio Olivier, opine that from  
4 1977 through 2005 the Hurricane Lake outlet structure discharged at least 12,002 acre feet  
5 and up to 25,877 acre feet of water into Devils Lake that would not have reached Devils Lake  
6 but for the construction of the project and lost storage created by it under their assertions.  
7 (Plaintiffs' Exhibit 331). This opinion is based upon the cumulative impact of lost storage  
8 that the plaintiff's expert determined from a low range elevation of 1549.5 feet to 1548.5  
9 feet, to an upper range for cumulative impact for lost storage based upon elevations of  
10 1550.35 feet to 1548.5 feet, (Plaintiffs' Exhibit 331), and even though plaintiff's expert  
11 admitted the meander line was not the natural outlet elevation. For these reasons set out  
12 below and from other findings in this decision, I find this opinion is unreliable:

- 13 a. For reasons explained in subsequent findings, the plaintiffs adoption of the  
14 West Study factor of .1865, to calculate the lost storage discharge is not  
15 reliable. (See Finding 608).
- 16 b. The facts assumed by Mr. Olivier in reaching this determination are not  
17 correct or reliable. First, he applies the calculation beginning in 1977.  
18 However, it was not until 1988 that this control structure was able to  
19 perform the function of drawing down the lake to 1548.5 feet. This was due  
20 to the downstream obstructions previously identified in other findings.  
21 Olivier acknowledged he did not take these channel obstructions and their  
22 impact into account. Second, there was no evidence of an initial draw down  
23 as Olivier claims. Third, Mr. Olivier presumed that from 1988 to 2005 the  
24 stop logs were not in place. The evidence does not support this.  
25 Because these underlying facts are not correct, the lost storage calculations  
26 would not be reliable.
- 27 c. Based on previous findings, this control structure did not function as  
28 planned for several years. Olivier's opinion does not account for this.
- 29 d. The Y factor used in the formula to calculate the cumulative impact of this  
30 project presumes facts not supported by the evidence and as explained in  
31 later findings. (See Finding 607).
- 32 e. Additional calculations used by Olivier to reach the calculations of annual  
33 impact in Plaintiffs' Exhibit 331 have not been explained in a manner  
34 sufficient to analyze or scrutinize them or otherwise rely on them. (See  
Finding 607).

31 So, from theses findings proximate cause has not been proved.

32 493. The plaintiffs have quantified the amount of contribution that they claim this outlet control  
33 project had in their expert's opinion on the increased elevations of the lake as set forth above.  
34 That opinion by Mr. Olivier was that the Hurricane Lake outlet structure contributed at least

1 12,002 acre feet and up to 25,877 acre feet of water into Devils Lake from 1977 through  
2 2005. He also opines that this constitutes .24 percent to .52 percent of the total volume of  
3 waters that have flowed into Devils Lake from 1977 through 2005, which he opined was  
4 5,000,117 acre feet. As stated in Knutson v. City of Fargo 2006 N.D. 97 ¶9 714 N.W. 2d 44;

5 *To prove inverse condemnation, the property owner must prove that a*  
6 *public entity took or damages his or her property for a public use and that*  
7 *public use was the proximate cause of the damage.*

8 In addition, as noted in Beilke by Bielke, supra the proximate cause must be a cause which  
9 had a substantial part in bringing about the injury. *Id.* at p.610.

10 Giving the plaintiffs the benefit of the doubt and for the purpose of addressing this issue, as  
11 a factual determination this court finds that a contribution of .24 percent to .52 percent of  
12 the total waters flowing into Devils Lake between this time period would not constitute a  
13 substantial part in bringing about any damages or taking claimed by the plaintiffs.  
14 Therefore, as to this project, proximate cause is not proved. This is because from a factual  
15 standpoint, this percentage of the total contribution by itself is extremely low.

16 If the inflow volume into Devils Lake claimed by the plaintiffs from the first project in 1957  
17 to 2005, 6,000,727 acre feet is applied, the claimed impact is even less. The impact range as  
18 a percentage of the total inflow volume for this time period would be .20% to .43%.  
19 Obviously, for reasons set out above this also would be insufficient to establish proximate  
20 cause.

21 Those possible percentage contributions are extremely low from a factual standpoint. None  
22 of these claimed percentage contributions set out in this finding are sufficient to constitute a  
23 substantial part or cause in bringing about any damages or taking claimed by the plaintiffs.  
24 So, they negate a finding of proximate cause as to this project, based on this.

25 494. Even by giving the benefit of doubt to plaintiffs that this quantified water volume is an  
26 accurate calculation and would constitute a substantial part in establishing proximate cause,  
27 N.D.C.C. 32-03.2-02 would require as a general rule that any liability for this project as to  
28 these particular defendants involved in it be several liability only, and not joint. By the  
29 plaintiffs' own facts offered by them, they set out a reasonable basis for determining the  
30 contribution of this project at Hurricane Lake to the harm allegedly suffered by the  
31 plaintiffs to their property by the increased levels of water entering Devils Lake. See  
32 N.D.C.C. 32-03.2-02 or, Lang v. Wonneberg, supra, Thorson v. City of Minot, supra.  
33 Consequently, even if liability was established as to this project and claim of lost storage  
34 impact, these defendants involved with the Hurricane Lake project would only be liable for  
any injuries, damages, or taking established to the extent of .24 percent to .52 percent of the

1 total damages based on their impact period of 1977 through 2005 or .20 to .43 percent for a  
2 time period of 1957 through 2005.

3 495. The plaintiffs maintain that diversion of water from Dry Lake by the creation of Channel A  
4 contributed to the increased water levels of Devils Lake and caused excess flooding to their  
5 property. Dry Lake is located north of U.S. Highway 2 and west of North Dakota Highway  
6 20. It is part of the chain of lakes and is situated west of Morrison Lake and Sweetwater  
7 Lake, as well as Cavanaugh Lake. It is east of Mike's Lake. Steve Hoetzer described Dry  
8 Lake as a type 4 wetland.

9 496. Waters that drain the Edmore Coulee sub-basin and the Starkweather Coulee sub-basin flow  
10 into Dry Lake to reach Devils Lake. The waters draining from the Edmore Coulee sub-  
11 basin drain first into Sweetwater and Morrison Lake, then travel west through Cavanaugh  
12 Lake and the Webster Coulee and then deposit into Dry Lake.

13 The waters of the Starkweather Coulee basin flow through the Starkweather Coulee directly  
14 into Dry Lake at an inlet on the north side of Dry Lake.

15 497. Prior to 1979 the waters in Dry Lake would flow in a westerly direction in a somewhat  
16 undefined channel towards Lake Alice. From Lake Alice it would outlet and then enter  
17 Lake Irvine. From Lake Irvine it would outlet into the Big Coulee and eventually discharge  
18 into West Bay of Devils Lake.

19 498. The chain of lakes described above had the capacity to store a significant amount of water.  
20 During 1965-1967 at least 112,000 acre feet of water was stored in this upstream chain of  
21 lakes. (Plaintiffs' Exhibit 407 p.1). In the past and currently, it was typical for farmers in  
22 the upper basin of Devils Lake to experience sheet water flooding every year. Until the  
23 sheet water drained into depressions, absorbed into the soil, or eventually found its way into  
24 the chain of lakes system or evaporated, planting was delayed or otherwise prevented.  
25 According to witness Steve Hoetzer, flooding of farmland in the chain of lakes area at times  
26 was 60,000 to 100,000 acres depending upon the conditions of springtime.<sup>5</sup> It is further  
27 acknowledged that the extent of sheet water flooding was subject to the volume of water,  
28 the available storage for the water, and the rate of discharge from any particular area  
29 holding water. In addition, other evidence from the testimony of experts acknowledge that  
30 another factor is the availability of evaporation days.

31 499. It was this flooding problem that prompted many of the projects complained of by the  
32 plaintiffs. It was the primary motive for the project relating to Dry Lake. As early as 1966  
33

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34 <sup>5</sup> No evidence was presented to indicate the current extent of farmland  
flooding in the upper basin.

1 the chairman for the Sweetwater/Dry Lake Water Management District, which eventually  
2 became the Ramsey County Water Resource District, submitted a letter to the North Dakota  
3 State Water Commission urging efforts to develop a project that would provide drainage  
4 into Devils Lake from the northern chain of lakes. (See Plaintiffs' Exhibit 430). Eventually  
5 a project was proposed in July of 1969 by Ramsey County and Cavalier County. In  
6 addition to incorporating channel improvements within the chain of lakes, a new channel  
7 called Channel A was proposed to connect Dry Lake directly with Six Mile Bay of Devils  
8 Lake. (Plaintiffs' Exhibit 205-bate stamp 101481). The channel was expected to be  
9 approximately 4.1 miles in length. *Id.* It also included a proposal that an outlet control  
10 structure be established on the south end of Dry Lake. One reason for this was to prevent  
11 degrading of the inlet to Channel A from Dry Lake. (*Id.* at bate stamp 101482)

12 500. On August 18, 1966 the plan was presented to the North Dakota State Water Commission  
13 at its meeting in Devils Lake, North Dakota. The minutes acknowledge that in 1965  
14 100,000 acres were under water from flooding and that flooding typically averaged from  
15 40,000 to 150,000 acres.

16 During the same time period the Sweetwater/Dry Lake Water Management District also  
17 complained of water entering the Sweetwater Lake complex from the Edmore Coulee but  
18 having difficulty moving into Dry Lake because of the plugging of channels. (Plaintiffs'  
19 Exhibit 430). As a consequence, Sweetwater Lake and the lakes adjoining it were  
20 completely filled and flowing west out of Morrison Lake. However, Dry Lake was hardly  
21 filled with any water. *Id.*

22 501. No action was taken by the North Dakota State Water Commission in 1966 to approve the  
23 proposal for a channel from Dry Lake to Six Mile Bay. In November of 1974 the Ramsey  
24 County Water Management District again solicited the North Dakota State Water  
25 Commission to consider the construction of a channel from Dry Lake to Six Mile Bay of  
26 Devils Lake. (Plaintiffs' Exhibit 309).

27 502. On March 24, 1977 the North Dakota State Water Commission together with the Ramsey  
28 County Water Management District and the Cavalier County Water Management District  
29 entered into an agreement for the construction of Channel A. (Plaintiffs' Exhibit 299). In  
30 that agreement the parties specified that the purpose for the construction of Channel A  
31 would be, ". . . To alleviate spring flooding on the flat farmland of central Ramsey County  
32 and southwest Cavalier County. Channel "A" will provide a means of diverting water  
33 directly and quickly into Devils Lake, thereby bypassing the slow, circuitous route which  
34 the water must now take." *Id.* In that agreement it was also acknowledged that it was

important that the reasonable storage of water in the upper basin be maintained. *Id.*

503. The estimated cost of the construction of Channel A was 2.1 million dollars. It was also agreed that the State Water Commission would contribute \$600,000.00 towards the project. On May 18, 1978 the Ramsey County District Court executed an order acknowledging that all legal procedures and requirements were complied with for the construction and financing of Channel A. (Plaintiffs' Exhibit 301). With the State Water Commission already having given prior approval by resolution dated March 24, 1977 preliminarily to the Channel A project, a contract was awarded.

504. The project was financed in two ways. First, as previously indicated, the North Dakota State Water Commission contributed \$600,000.00 towards the project. In addition, special assessments were made against landowners in Ramsey County and Cavalier County for the cost of the project.

505. Channel A as constructed was an open cut channel designed to divert water. It was not an improvement of an existing channel. The project consisted of a radial gate control structure at the south end of Dry Lake. The channel itself was approximately four and one-half miles long reaching from the south end of Dry Lake to Six Mile Bay of Devils Lake. It was constructed with a 50 foot wide bottom and a side slope was 3:1 or 4:1. The upper two miles of Channel A were excavated to a depth of approximately 35 feet. The remainder of the channel was excavated to a depth of approximately 15 feet.

Another part of the plan included a proposal that the outlet from Dry Lake to Lake Alice be blocked so that all the waters from the Edmore and Starkweather watershed were diverted down to Devils Lake through Channel A.

Although Channel A was designed for a 500 cfs capacity in fact it far exceeded that original design capacity and at times reached flows in excess of 2000 cfs as more water accumulated in the upper basin and began its flow towards Devils Lake.

506. The project was initiated in 1978 and then completed in 1979. In 1980 the Channel A operating plan was executed between the North Dakota State Water Commission acting through the North Dakota State Engineer and the Ramsey County Water Management District and the Cavalier County Water Management District. By the terms of that agreement 1447.5 feet msl would be the control elevation of Dry Lake by way of the Channel A outlet and the lake would be drawn down to an elevation of 1445 feet msl in October of each year. Further, the agreement provided that the operation of any gate or control structure and its procedures must be approved by the State Engineer. As the agreement and operating plan provided (Plaintiffs' Exhibit 304):

*The Ramsey County Water Management District shall be responsible for*

1           *the physical operation of the Channel A project, and a permanent control*  
2           *structure in the natural outlet of Dry Lake. The operation of the Channel*  
3           *A gates and any other outlet gates to Dry Lake shall be approved by the*  
4           *State Engineer in all instances.*

5 507. A permanent control structure was built at the natural outlet of Dry Lake. This was at a  
6 location at the natural outlet site in the northwest corner of Dry Lake. The elevation of the  
7 structure was to be 1449.5 feet msl. Both Cary Backstrand and Steve Hoetzer substantiated  
8 that the natural outlet for Dry Lake prior to the construction of Channel A was 1449.5 feet  
9 msl. Steven Hoetzer testified that it was the belief of their agency when he was employed  
10 with it that the natural overflow out of Dry Lake towards Lake Alice was 1449.5 feet. Cary  
Backstrand's recollection was "around 1449 feet".

11 508. The original plan was to include a control structure in the northwest outlet to allow water to  
12 also flow into the northwest outlet channel westward into Lake Alice as well as diverting  
13 water through Channel A. Once the channel and new outlet structure at the south end of  
14 Devils Lake was in place, this never happened. Cary Backstrand does not recall any water  
15 flowing west out of Dry Lake once Channel A and its south outlet structure were made  
16 operational.

17 509. In the first year of its operation, 1979, Devils Lake saw an increased volume of 190,167  
18 acre feet. However, this was also a time when the prior winter season had significant  
19 snowfall in the area and a late and rapid snow melt. After 1979 for several years and until  
20 1993 there were 9 years out of 14 years in which the water volume of Devils Lake actually  
21 decreased as did its elevation. In fact, from 1979 through 1992 inclusive, Devils Lake  
22 experienced a net decrease in the water volume of the lake of 22,526 acre feet.

23 It was not until 1993 and the years subsequent to that that Devils Lake experienced regular  
24 annual increases in the water volume of the lake. Further, these increases were distinctively  
25 and substantially greater than in prior years or decades. Between 1993 and 2006 the  
26 average water volume increase per year was 153,472 acre feet over that 14 year time period.

27 510. The parties dispute what the natural outlet elevation was for Dry Lake. Plaintiffs claim it is  
28 1449.5. Defendants claim it is 1447.5. I find the actual natural outlet elevation for Dry  
29 Lake is between 1449 feet and 1449.5 feet. This based on the following:

30 a. The defendant parties assert that the natural outlet elevation of Dry Lake as it  
31 outletted in the northwest corner of the lake was 1447.5 feet. They rely on the  
32 testimony of Dale Frink as well as Plaintiffs' Exhibit 150. There is no  
33 evidence what the source is for the publication of Plaintiffs' Exhibit 150. this  
evidence is not reliable compared to other evidence.

34 b. On the other hand, the plaintiffs rely on the testimony of Steven Hoetzer and  
Cary Backstrand. The former testified that the natural outlet elevation was

- 1 1449.5 feet. Cary Backstrand recalled that it was around 1449 feet. Both  
2 were quite familiar with Dry Lake from their years of work experience there.
- 3 c. Plaintiffs also rely on Plaintiffs' Exhibit 304. Plaintiffs' Exhibit 304 indicates  
4 that a permanent control structure was to be built at the natural outlet to Dry  
5 Lake and that the elevation of the structure was to be 1449.5 feet msl. The  
6 structure was to be designed so that uncontrolled overflow over the spillway  
7 would occur at that elevation. On the other hand, the control structure at the  
8 south end of Dry Lake to control water entering into Channel A was to include  
9 a draw down capability to an elevation of 1445 feet msl. The manner in which  
10 it was to be operated was to leave the gates open during the winter months.  
11 Beginning in the spring during runoff the gates would remain open until Dry  
12 Lake reached a level of 1447.5 feet. At that point they would be closed until  
13 October 1 of that year. Plaintiffs' Exhibit 304 does not give any guidance as  
14 to what the natural outlet elevation was for Dry Lake. All that it accomplishes  
15 is to describe how the elevation would be controlled once the outlets were  
16 constructed and placed on the northwest corner of Dry Lake and the south end  
17 of Dry Lake. So, this was not considered in making this finding.
- 18 d. Plaintiffs' Exhibit 58, the engineering plan and schematics for Channel A,  
19 notes that the planned weir would have an elevation of 1451 feet. It also states  
20 that the water surface elevation of Dry Lake on July 8, 1969 was 1449.7 feet.

21 Considering all of the above, this court finds that the natural outlet elevation of Dry Lake  
22 was between 1449 feet and 1449.5 feet. This latter figure is that which the plaintiffs' expert,  
23 Cecelio Olivier, used to calculate a one time draw down and for his other calculations.  
24 Consequently, using that figure was a reliable basis for making calculations relating to the  
25 Channel A-Dry Lake project.

26 It is acknowledged in making this finding that Dry Lake has reached even higher elevations  
27 than 1449.5 feet. For example, in 1979 Dry Lake reached a reported peak elevation of 1451  
28 feet msl. (See Plaintiffs' Exhibit 165 p.6). Considering that the natural channel was  
29 plugged and poorly defined and was very inefficient in transporting water through the chain  
30 of lakes, this is not unexpected. It is also a manifestation that the channel capacity, outlet  
31 capacity, and rate of water discharging into Dry Lake all impacted water elevation and  
32 channel flow volume out of the lake at any given time and depending on where the elevation  
33 reading was made.

- 34 511. Once Channel A came into operation it did operate as planned until 1994. In that year the  
elevation of Devils Lake disrupted the functioning of Channel A and its outlet structure.  
For example, in 1994 the gates remained open all summer, but this was due to excess rains  
during the summer. Keeping the gates open was consistent with the original agreement as  
these summer conditions were an agreed exception to the gates being closed.

Then in 1995 vandalism began and that was followed by impacts created by Devils Lake

1 itself. In 1995 locks were broken and gates opened which resulted in increased waters  
2 flowing out of Dry Lake. To address this the gates were left closed through October to help  
3 increase evaporation in the upper basin and relieve the flood situation on Devils Lake.  
4 During this time period beginning in 1993 significant volumes of water were now  
5 beginning to enter the Devils Lake as compared to prior years. Vandalism continued into  
6 1997 and the wheels controlling the gates were removed to avoid unauthorized opening and  
7 closing. The gates were again left closed through most of October of 1997 to increase  
8 evaporation in the upper basin and relieve the flood situation on Devils Lake. By the year  
9 1999 the level of Devils Lake had almost reached the outlet level of Dry Lake at 1447.5 feet  
10 at the Channel A gates. The next year the Devils Lake elevation dropped to 1446.36 feet,  
11 but in the year 2001 the lake rose to 1448 feet. It did drop in the next years to  
12 approximately 1447.5 feet. Then it climbed to 1449 feet and greater in 2004. As noted in  
13 the Channel A maintenance plan for 2001, *"the base of Channel A gates is at elevation of*  
14 *1445 msl. When gates were closed on April 5, the waters flowed north into Dry Lake. The*  
15 *gates remained closed until October 6 when two gates were opened and all the gates were*  
16 *opened by October 27, spring runoff was minimal."* (See Plaintiffs' Exhibit 307-bate  
17 stamp 463570). All of the above is based upon the different attachments to Plaintiffs'  
18 Exhibit 307. By at least the year 2000 back flow from Devils Lake was impacting the  
19 gauge readings on Channel A and the gauges were taken out of service.

20 512. The plaintiffs through their expert witness, Cecelio Olivier, opine that because of the Dry  
21 Lake diversion project known as Channel A, that Channel A and the design and operation  
22 of its outlet structure is responsible for increased volumes of water discharging into Devils  
23 Lake that would not have otherwise discharged into the lake. By his calculation, Mr.  
24 Olivier opines that from 1979 to 2005 the volume of water that discharged into Devils Lake  
25 was 4,692,783 acre feet. He opines that in this same time period 116,980 acre feet of water  
26 entered into Devils Lake that would not have but for lost storage experienced in Dry Lake  
27 due to the Channel A project. (Plaintiffs' Exhibit 335). For reasons set forth below as well  
28 as the other findings set out in this decision, I find this opinion that the Channel A project  
29 caused 116,980 acre feet of water from lost storage to discharge into the lake is not reliable:

- 30 a. For reasons explained in subsequent findings the plaintiffs adoption of the  
31 West Study factor of .1865 to calculate lost storage is not reliable. (See  
32 Finding 608).
- 33 b. Facts assumed by Mr. Olivier in making his calculations are not correct.  
34 First, by 2001 water flow north from Devils Lake into Dry Lake caused any  
gauge readings to be suspect and unreliable. Plaintiffs did not consider this  
in their calculations. Second, there was no true gauge data from 1979 to

1982 – only estimates.

- c. by 1996 the chain of lakes west of Dry Lake were a part of Devils Lake. So, any westerly flow at this point absent Channel A would have entered in Mike's Lake and commingled with Devils Lake waters.
- d. The Y factor used in the formula to calculate the cumulative impact of this project presumes facts not supported by the evidence and as explained in later findings. (See Finding 607).
- e.. Additional calculations used by Olivier to reach the calculations of annual impact in Plaintiffs' Exhibit 335 have not been explained in a manner sufficient to analyze or scrutinize them or otherwise rely on them. (See Finding 607).
- f. Mr. Olivier did not use 1447.5 feet to make this calculation. He used 1446 feet (T.T. Vol. 6, p.1211, 1.6-12). He used that through 2005. Devils lake reached that elevation in May of 1999. So, there are 7 years that Olivier includes in the calculations for this project to determine its cumulative impact even through Dry Lake had become part of Devils Lake.
- g. Although at times the gates were open to some level in accordance with the plan, that was not always the case. Olivier's method to calculate impact does not consider this.

Some amount of additional water would have discharged into Devils Lake because of the outlet elevation change. However, the methodology used by the plaintiffs to calculate the volume is unreliable. It would require speculation to attempt to determine what it might be. So, insofar as the evidence presented by the plaintiffs, this would be insufficient from a factual standpoint to prove that this project was a proximate cause of the damages or taking claimed by the plaintiffs.

513. The volume of water the plaintiffs claim impacted water elevations of Devils Lake would not be a substantial part of the volumes discharging into the lake. As cited in Knutson v. City of Fargo 2006 N.D. 97, ¶9 in an inverse condemnation action the property owner properly must prove that a public entity took or damaged his or her property for a public use and that public use was the proximate cause of the damage. As previously cited in these findings, a component of proximate cause is that the proximate cause be a substantial part in bringing about the harm or damages. Beilke by Beilke v. Coryell 524 N.W. 2d 607, 610 (N.D. 1994). As a percentage of the entire volume of waters that have entered Devils Lake from alleged lost storage, Mr. Olivier opines that from 1979 through 2005, this water volume equals 2.49 percent of the total volume of the water.

Even presuming the correctness of the calculations opined by the plaintiff's expert that from 1979 until 2005 that the quantified amount of 116,980 acre feet constituted 2.49 percent of the total contribution during this time period and giving them the benefit of the doubt in

1 addressing this issue, this volume would be insufficient to constitute a substantial part or  
2 factor in bringing about the increased water levels of Devils Lake. Therefore, this would  
3 preclude a finding of proximate cause for any damages or taking claimed by the plaintiffs,  
4 as to Channel A and its defendants arising from plaintiffs' claim of lost storage discharge.  
5 This is because Olivier's percentage, 2.49%, of the total contribution by itself from a factual  
6 standpoint is too low.

7 If the inflow volume of Devils Lake claimed by plaintiffs from the first project in 1957  
8 through 2005, 6,000,727 acre feet, is applied, the claimed impact is even less. The impact  
9 as a percentage of the total inflow volume for this time period would be 1.95%. Obviously,  
10 for reasons set forth above this would be insufficient to establish proximate cause.

11 These possible percentage contributions are extremely low from a factual standpoint. So,  
12 based on this, this claimed contribution is insufficient to find that the Channel A project was  
13 a proximate cause of the damages and taking claimed by the plaintiffs.

14 514. In its Memoranda Decision of February 8, 2006 this court agreed with the plaintiff that  
15 Lang v. Wonneberg created an additional exception to the several liability requirement of  
16 N.D.C.C. 32-03.2-02 by the Supreme Court's citation of Section 433A of the Restatement  
17 of Torts (1965). At that section the treatise states that damages for harm are to be  
18 apportioned among two or more causes where there are distinct harms or there is a  
19 reasonable basis for determining the contribution of each cause to a single harm.

20 In giving the benefit of doubt to plaintiffs to address this issue, this court finds that the  
21 quantified contribution attributed to the impact the Dry Lake outlet of Channel A, 116,980  
22 acre feet, to the water levels of Devils Lake, serves as a reasonable basis for determining the  
23 contribution of that project and its developers and maintainers. The results obtained and  
24 asserted by the plaintiff easily provide for a way to apportion the claimed harm.  
25 Consequently, N.D.C.C. 32-03.2-02 would require several liability only to this project and  
26 not joint liability for damages or taking, if any. Therefore, the defendants identified as  
27 responsible for this project would only be liable for 2.49% of the total damages or taking  
28 based on plaintiffs impact period of 1979 through 2005 or 1.95% of the total for an impact  
29 period of 1957 through 2005. In any event, this court has found that the contribution was  
30 not a substantial part in bringing about any damages or taking claimed by the plaintiffs.

31 515. The liability for any damages found, if any, arising from the construction and maintenance  
32 of Channel A would fall to four entities. The Ramsey County Water Resource District and  
33 the Cavalier County Water Resource District initiated and then participated in the  
34 construction of Channel A. They remained involved subsequent to that in its maintenance,

1 at lease to some degree. The North Dakota State Water Commission and the State Engineer  
2 would also be liable for damages, if any. It participated in it by designing plans, cost  
3 sharing and making day to day administrative decisions in its construction. They acted  
4 beyond their discretionary function. Subsequent to its construction, the North Dakota State  
5 Water Commission and State Engineer were also involved in the maintenance of the project  
6 and the administration of the water flowing from Dry Lake into Channel A and then into  
7 Devils Lake. In fact, the State Engineer approved all annual operation plans including  
8 elevation levels and when they would be set.

9 516. That Channel A was not a substantial factor or cause in bringing about any damages caused  
10 to the plaintiffs is supported by the limited analysis offered by Doctor Lawrence Woodbury.  
11 Doctor Woodbury is a professional civil engineer. He possesses an undergraduate degree in  
12 civil engineering. He has two masters degrees, one in business administration and one in  
13 civil engineering. He has a doctorate degree in civil engineering. During that time he  
14 worked on his doctorate he concentrated in the field of water resources engineering and  
15 statistical techniques in hydrology. Doctor Woodbury was an assistant professor in the civil  
16 engineering department at North Dakota State University for six years. During this time he  
17 taught on the subject of hydrology and water hydraulics. Otherwise and except for four  
18 years as an engineer in the USAF, Doctor Woodbury has been an engineer with several  
19 consulting firms. Since 1994 he has been with Houston Engineering of Fargo. He is  
20 currently their president and COB. He is a Brigadier General in the North Dakota Air  
21 National Guard. He is the author of several publications. His analysis regarding the impact  
22 of Channel A is reflected in Plaintiffs' Exhibit 472.

23 517. In addressing the impact that Channel A had on the rise of Devils Lake Doctor Woodbury  
24 concentrated in a time period of 1983 to 1997. For the purposes of accomplishing the  
25 study, this was a reasonable and appropriate area of concentration. The reason in selecting  
26 these years is that his objective was to determine the flow of water into the lake with the  
27 presence of Channel A and without the presence of Channel A. To accomplish this and  
28 based on the methodology of his study, he was required to use the gauges available in the  
29 chain of lakes system of the upper basin to determine the volume of water entering the lake  
30 and traveling through the three water channels.

31 Consistent availability of gauges existed only for 1983 and up to 1997. Doctor Woodbury  
32 did not include the years from 1979 up to 1983. The reason for this is that there was no  
33 water gauge in place and used on Channel A until 1983. Beginning in 1997 Devils Lake  
34 reached an elevation of 1441.6 feet. This was the elevation of the Lake Irvine outlet.

Consequently, by that time in 1997 Devils Lake was already reaching the elevation of Lake Irvine and some of the other chain of lakes. So, it had impacted gauge readings and data. Going beyond 1996 would have required Doctor Woodbury to estimate the volumes of water entering through the two channel systems. So, the methodology used by Doctor Woodbury as it relates to limiting the time period was appropriate under the circumstances.

518. From the period of 1983 to 1997, Doctor Woodbury calculated that the contribution that Channel A had to the volume of water in Devils Lake was 42,635 acre feet. As his methodology for reaching this calculation, Doctor Woodbury considered a number of factors. First, as previously indicated he determined to use only the time period from October 1, 1983 to September 30, 1996. Again, the reason for this is that stream gauge data was not available for Channel A prior to October 1, 1983 and the waters of Devils Lake began to back up into the chain of lakes in 1997 via the Big Coulee, thereby disrupting the accuracy of the stream gauge data after that point.

Stream gauge data was collected from 3 points. Data was obtained from the gauges on Channel A, from the gauges on the lower Mauvais or Big Coulee, and the gauge on Little Coulee. The Little Coulee is a tributary that enters the Big Coulee between Lake Irvine and the U.S.G.S. stream gauge on the lower end of Big Coulee. Consequently, this stream gauge data for the Little Coulee had to be subtracted from the Big Coulee data to determine the discharge from Lake Irvine and the chain of lakes. The waters flowing into the Big Coulee from the Little Coulee have no relationship to the upper chain of lakes. Consequently, this had to be taken out of the calculations.

Certain presumptions had to be made for creating a continuous lake stage hydrograph. Likewise certain presumptions were made regarding the stage discharge curve for Lake Irvine based upon a combination of data from the North Dakota State Water Commission. Actual stage discharge measurements were based upon data from the U.S. Fish and Wildlife Service. It was correctly assumed that the minimum level of Lake Irvine was 1441.6 feet for discharge purposes and that the water level would be flat throughout the chain of lakes. A determination was then made of the daily surface area in acres and volume in acre feet of water in the chain of lakes. This was accomplished by using the computed lake stage hydrograph and area capacity data for the lakes.

With all of the above data calculations and assumptions, Doctor Woodbury then proceeded to go forward with his calculations. They included the following:

- a. First, inflow into the chain of lakes was calculated. This was done by using the daily change in volume of the chain of lakes and the discharge from Lake

Irvine using a formula of: **inflow equals outflow plus storage change.**

- b. To this inflow calculated above the Channel A discharges were added to estimate the inflows to the chain of lakes if Channel A had not been in place.
- c. Next, computations were made to revise the water levels for the chain of lakes using a Microsoft Excel spreadsheet and the computed chain of lakes inflows for the conditions without Channel A. This required an assumption that the discharges occurring through the natural outlet would have been the same as those recorded for Channel A. (This was because Doctor Woodbury was unable to locate or calculate a rating curve for the old Dry Lake outlet).
- d. Monthly evaporation data obtained from the USGS was converted to daily evaporation in feet. Surface areas for the chain of lakes were calculated using a computed daily stage data. Then, daily evaporated losses were calculated using the surface areas and daily evaporation.
- e. These calculations resulted in a determination that the total evaporative losses in the chain of lakes for the time period from October 1, 1983 to September 30, 1996 was 288,095 acre feet with Channel A in place during this time period.
- f. The total evaporative losses that were calculated for this time period in the chain of lakes without the presence of Channel A was calculated to be 330,730 acre feet.
- g. This resulted in a calculation that the evaporative losses that the chain of lakes would have experienced without the presence of Channel A during the time period of October 1, 1983 to September 30, 1996 would have been 42,635 acre feet.

This court finds this to be a reliable estimate of Channel A's contribution to the increased lake elevations during this window of time. However, because of the absence of other evidence in the record that allows for it, a comparison to the total and the impact on plaintiffs over time as their lands were inundated cannot be reasonably determined.

519. Although the plaintiffs' expert does not disagree with the general methodology used by Doctor Woodbury to reach the calculation that there was 42,635 acre feet of impact from decreased evaporation losses in this limited time period as the result of the construction of Channel A, Mr. Olivier does feel that there were other flaws in Doctor Woodbury's analysis. This court appreciates that the analysis was based on certain assumptions and limited in time. Addressing each of the concerns raised by the plaintiff at its brief on page 95:

- 1 a. The plaintiffs assert that the analysis did not include the impact of lost  
2 storage from Dry Lake initially and cumulatively – the plaintiffs are correct.  
3 This measurement by Doctor Woodbury does not consider lost storage. It  
4 only considers what additional evaporation of water would have been  
5 experienced in the Devils Lake Basin but for Channel A. None of the  
6 parties have indicated how this result by Doctor Woodbury might properly  
7 interact and/or compliment any other calculations or conclusions. It is  
8 further complicated because it is unclear how plaintiffs performed their final  
9 calculations for Plaintiffs' Exhibits 331-336.
- 10 b. The entire time period was not considered - The trial court as did Doctor  
11 Woodbury recognizes this. His explanation for not including it was testified  
12 to and reasonable. The court recognizes that the time period in which the  
13 impact is being measured by Doctor Woodbury's analysis is only a part of  
14 the total time period plaintiffs claim Channel A may have impacted the  
15 plaintiffs. However, because there is no sufficient evidence that allows for it  
16 to be reasonably inferred by some quantified amount, this court will not find  
17 that some additional volume would be discharging into the lake before 1983  
18 and after 1996.
- 19 c. Plaintiffs asserts Doctor Woodbury did not take into account evaporation  
20 benefits of the area east of the natural outlet of Dry Lake - This court is of  
21 the conclusion that to do so would have been under this analysis speculative  
22 on the part of Doctor Woodbury and inconsistent with the methodology that  
23 he otherwise used. Also, plaintiffs do not show how this could have been  
24 properly done.
- 25 d. Plaintiffs assert that the Woodbury analysis does not account for adjacent  
26 low lying depressional areas in the flood plains that would trap and  
27 permanently store water – Again plaintiffs do not offer where this data or  
28 information would have come from and without that it would be speculative  
29 to pursue. It would also be inconsistent with the methodology used in the  
30 analysis or the purpose of the study.
- 31 e. Plaintiffs assert that no accounting is made for other outlet alterations  
32 occurring in any of the lakes in the chain of lakes - It is correct that no other  
33 outlet alterations were directly considered. However, the purpose of this  
34 was to calculate the impact of Channel A on the Devils Lake elevations due

1 to loss of evaporation benefits using a methodology that evaluated the  
2 plaintiffs' claim differently. Plaintiffs do not suggest how these outlet  
3 alterations in the other lakes would have been incorporated in the  
4 methodology and the analysis used to reach a different result by Doctor  
5 Woodbury. Further, because gauge data was used in Doctor Woodbury's  
6 calculations, it seems that would have accounted for any alterations in  
7 existence at that time because the gauge readings would have evidenced the  
8 impact of those actual alterations when the gauges measured the water.

9 In addition to those concerns raised by the plaintiff, Doctor Woodbury also acknowledged  
10 that he did not take into account the additional benefits favoring the defendants that would  
11 have been received from evaporation of this water in the body of Devils Lake itself.  
12 Considering all of the above this court recognizes that there were limitations to the analysis  
13 offered by Doctor Woodbury which results in his conclusion that had Channel A not been  
14 constructed, an additional 42,635 acre feet of water would have evaporated and not entered  
15 Channel A from 1983 to September of 1996.<sup>6</sup>

16 520. The defendants seem to concede that Channel A contributed 42,635 acre feet of water that  
17 would otherwise have been taken through evaporation from the water budget of the upper  
18 basin from 1983 to 1996 (and recognizing it does not account for evaporation of it on Devils  
19 Lake itself). This contribution as a part of 4,692,783 acre feet of water entering Devils Lake  
20 from 1979 to 2005 is .9% of the total. As a percentage of all of the waters flowing into  
21 Devils Lake from 1957 to 2005, 6,000,727 acre feet, it would constitute .7%.

22 As a factual determination, neither percentage of .7% or .9% is sufficient to constitute a  
23 substantial part in bringing about the damages or taking claimed by the plaintiffs. All of  
24 these possible percentage contributions are extremely low from a factual standpoint.  
25 Therefore, I find that this evidence from Doctor Woodbury's study is not sufficient to  
26 establish proximate cause for the damages, taking or harm claimed by the plaintiffs to their  
27 properties.

28 Last, even if it was, N.D.C.C. 32-03.2-02 would require several liability, only as this would  
29 serve as a reasonable basis to apportion any harm.

30 521. The plaintiffs claim that a project relating to the Sweetwater-Morrison Lake contributed to  
31 the increased elevations of Devils Lake after this project was completed. Sweetwater Lake  
32

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33 <sup>6</sup> Doctor Woodbury also did an analysis of the impact of Channel A from 1993 to  
34 1999 from possible depressional storage and taking into account the West study.  
This analysis will be addressed in other later findings.

1 and Morrison Lake are located north of the city of Devils Lake and U.S. Highway 2. They  
2 are both to the east of Cavanaugh Lake and Dry Lake and of North Dakota Highway 20.  
3 Sweetwater Lake is situated just south of Morrison Lake. The lakes are in such proximity to  
4 each other that they are often referred to as one lake, Sweetwater-Morrison Lake. These two  
5 lakes are located in the Edmore Coulee sub-basin. The waters that drain from that sub-basin  
6 and into the Edmore Coulee ultimately drain into Sweetwater Lake and then into Morrison  
7 Lake. From Morrison Lake the water overflows through Cavanaugh Lake into Webster  
8 Coulee. Ultimately, the waters discharge into Dry Lake. Sweetwater Lake is eight feet  
9 deep. Morrison Lake is eight to ten feet deep. Steve Hoetzer described both of these lakes  
10 as type 5 wetlands.

11 522. The project involved with Morrison-Sweetwater Lake was both an outlet control structure  
12 and channel improvements. In June of 1978 the Ramsey County Water Management  
13 District requested the North Dakota State Water Commission for financial assistance for the  
14 purpose of planning, constructing and enlarging the channel at Morrison Lake to Dry Lake.  
15 In late August of 1981 the North Dakota State Water Commission acting through its State  
16 Engineer and the Ramsey County Water Resource Board entered into an agreement to  
17 investigate the improvement of the outlet to Morrison Lake. As indicated, the purpose of the  
18 investigation was to "*study the effects of increased flows from Morrison Lake on the channel*  
19 *between the improved outlet and Dry Lake*". (Plaintiffs' Exhibit 30). The purpose behind  
20 the study was to seek a solution to periodic flooding in the lands adjacent to Sweetwater and  
21 Morrison Lakes.

22 523. In 1983, an application was filed with the North Dakota State Water Commission by the  
23 Ramsey County Water Resource District for authority to drain waters into Webster Coulee  
24 and Dry Lake based upon the preliminary port of the Morrison Lake outlet. Hearing on the  
25 application was held on August 11, 1983 before the North Dakota State Water Commission.  
26 A significant theme of the testimony was that without a outlet control structure during high  
27 flood years there was a tendency of the water to build up. Then, when it finally came out of  
28 Sweetwater and Morrison Lake, it would erode the channels and outlet so that ultimately  
29 more water came out than might otherwise would have. Consequently, less water would  
30 naturally be stored in the subsequent year, particularly during 1979-1980. The conclusion  
31 was that an outlet structure would help avoid that kind of outlet/channel erosion and thereby  
32 improve storage capacity.

33 524. Morrison Lake has two outlets. One outlet is in the southwest corner of the lake. The  
34 second outlet is located in the northwest corner of the lake. These two outlets eventually

1 join near N.D. Highway 20 and then flow into Dry Lake. There is a dispute as to the natural  
2 outlet elevation of Sweetwater Morrison Lake. The plaintiffs' expert, Cecelio Olivier, in his  
3 calculations used a natural outlet elevation of 1460.6 feet msl. The plaintiffs maintain this is  
4 the correct natural outlet elevation. The defendants assert that the natural outlet elevation is  
5 closer to 1459 feet. For reasons set forth below this trial court finds that the correct natural  
6 outlet elevation is 1459 feet msl. This is based upon the following:

- 7 a. The initial report authorized by the North Dakota State Water Commission  
8 completed in July 1982, concluded that the natural outlet elevation was 1459  
9 feet. As noted by Carey Backstrand in his report at the August 1983  
10 hearing, that was the point in which water would naturally flow out of  
11 Morrison-Sweetwater Lake.
- 12 b. The meander level of the lake is 1460.6 feet. (Plaintiffs' Exhibit 137). As  
13 previously noted, the natural outlet elevation is typically lower than the  
14 meander level.
- 15 c. Although the lake rose as high as 1461.4 feet in 1979, this was because there  
16 was an extremely large flood event in the area at the time that came about  
17 from late spring thawing of significant snowfall. Calculations concluded  
18 that the proposed outlet structure would not aid substantially in bringing the  
19 water level down during flood events. The reduction would only be  
20 marginal. (See Plaintiffs' Exhibit 133, p.3). However, the benefit perceived  
21 is that the water would not stand on the land as long as it did under existing  
22 conditions. *Id.* The 1997 event indicates outlet capacity was not capable of  
23 discharging water rapidly relative to water entering this lake during such a  
24 large flood event.
- 25 d. The findings of the North Dakota State Water Commission relating to the  
26 application to pursue this project determined that the approximate natural  
27 outlet elevation of Morrison Lake was 1459 feet msl. (Plaintiffs' Exhibit  
28 134).
- 29 e. By at least 1975 the average meandered level of the lake was 1460.6 feet. *Id.*  
30 at p.8.
- 31 f. Carey Backstrand in his memo/report of September 28, 1983 agreed as an  
32 engineer of the State Water Commission that the earlier preliminary  
33 engineering report regarding the project established the outlet elevation of  
34 1459 feet at the southwest outlet and an outlet elevation approximately 2

1 feet higher at the northwest outlet. Consequently, water ultimately will flow  
2 out of Sweetwater-Morrison Lake at an elevation naturally of 1459 feet.

- 3 g. Although the northwest outlet elevation from Morrison Lake is higher than  
4 that at the southwest outlet elevation, ultimately the water from Morrison  
5 Lake would discharge out of the lower southwest outlet causing the lake to  
6 reach an elevation of 1459 feet from outletting. In its findings published on  
7 September 2, 1983, Carey Backstrand of the North Dakota State Water  
8 Commission recommended the construction of a control outlet structure on  
9 Lake Morrison with a positive control at elevation 1458 feet msl and that its  
10 design be based on a channel capacity of 400 cubic feet per second..  
11 (Plaintiffs' Exhibit 1340). It was found by Backstrand that the project had  
12 statewide significance. He noted the observations of the North Central  
13 Engineering consultant, John A. Klingenberg, whereby he stated that " . .  
14 . There is no more water going to go into Dry Lake and subsequently into  
15 Devils Lake than is going in there now. In fact, there could be`l  
16 instances where it would be less because of the fact that we can hold it up  
17 above for a longer period of time and let it in at a lesser rate. So, there  
18 could be years when . . . they will actually be putting less water into Devils  
19 Lake, the ultimate resting place of the water . . . ." *Id* at p.6.

20 Based upon all of the above this court finds that the more reliable evidence of the natural  
21 outlet elevation for the lake establishes it at 1459 feet msl.

22 525. In October 6, 1983 the approved application to build the outlet control structure was  
23 provided to Ramsey County Water Resource District. As approved the project included  
24 channel improvements from Morrison Lake through Cavanaugh Lake to Dry Lake.

25 526. The channel improvements were accomplished first. Phases I and II involved channel  
26 improvements between Dry Lake and Cavanaugh Lake west of N.D. Highway 20. The  
27 planning and financing of the project involved the North Dakota State Water Commission  
28 and the Ramsey County Water Resource District. (See Plaintiffs' Exhibit 139). That  
29 agreement was entered into in June of 1985. *Id*. The phase I and II project was completed  
30 in late 1986. (See Plaintiffs' Exhibit 140). Phase I consisted of a ditch diversion and road  
31 relocation and reconstruction of the existing channel. Phase II consisted of reconstruction of  
32 the existing channel in that stretch of the natural channel. Phase II also resulted in the  
33 connection of the diversion channel with work done on the original channel. (Plaintiffs'  
34 Exhibit 140). Final payment on phase I and II was made in January of 1987. (Plaintiffs'

Exhibit 142). The Phase II project was completed in November of 1987. (See Plaintiffs' Exhibit 144 – bates stamp page 465985).

The next phase of the project improvements was for phase III which was also west of N.D. Highway 20 and south of Webster, North Dakota. The phase III project was located in Sections 4 and 9 of Freshwater Township. The project involved 12,365 feet of channel improvements, field inlets and a ditch block in Section 4. (Plaintiffs' Exhibit 143). That project began in the summer of 1987 and completed thereafter. Proof of phase III completion was Plaintiffs' Exhibit 146. That indicates completion in late summer of 1987.

Phase IV apparently was done at about this same time as phase III. It involved channel improvements also just west of North Dakota Highway 20 and the channel beneath North Dakota Highway 20.

Phase V was the last part of the project completed and was closest to Morrison Lake. It was the channel area between N.D. Highway 20 and the Morrison Lake outlet structure. This included not only those channel improvements but the construction of the control structure itself. This phase included the construction of a control outlet structure, a new outlet channel, and reconstructing a portion of the existing channel. (See Plaintiffs' Exhibit 147). This project phase began in late 1987. It was completed so that the control structure became operational in the spring of 1989. (Plaintiffs' Exhibit 148).

527. In total, all of the channel improvements was 7.2 miles in length. It included 1.6 miles of channel improvements from Morrison Lake to Cavanaugh Lake and 5.6 miles of channel improvements from Cavanaugh Lake to Dry Lake. It involved the widening and improvement of the channel to sixty feet wide and four to six feet deep. This would have resulted in an increase in the channel capacity, thereby causing water discharging into the channel in the land area adjacent to the improvements to flow more quickly to Dry Lake. How much more is not evident from the evidentiary record. There is insufficient evidence to determine the channel capacity prior to the improvements. There is insufficient evidence in the record quantifying the impact of this project on the water volume in Devils Lake. Based on this as well as previous and subsequent Findings, there is insufficient evidence to find that these channel improvement projects were a proximate cause of any damages or taking claimed by the plaintiffs.

528. The outlet control structure was located on the west side of Morrison Lake in an area that previously did not have major discharge from the lake. Consequently, a portion of the channel improvement included the construction of a new channel to connect to the natural channel route.

1 The outlet control structure was a 70 foot wide weir installed with a 60 inch culvert  
2 equipped with a control gate so as to allow the lake to be drawn down from 1459 feet msl to  
3 1458 feet msl. The structure had stop logs which could be removed to allow the lake level  
4 to be drawn down.

5 The original plan called for an outlet structure to control the lake to 1459 feet. That was  
6 modified to allow the lake to be lowered to 1458 feet. The reason behind this was that by  
7 lowering the lake to 1458 feet during the later part of the year, this would provide for an  
8 estimated additional 6,000 acre feet of flood storage for the next spring to help manage flood  
9 waters that would otherwise enter the Morrison Lake Sweetwater Lake complex and then  
10 into Dry Lake and ultimately into Devils Lake. (Plaintiffs' Exhibit 135). At that time in  
11 1983 when the calculation was made by Carey Backstrand, he concluded that it had the  
12 potential to increase the rise of Devils Lake one-tenth of a foot.

13 529. In 1998 the Devils Lake Joint Water Resource District submitted a request to insert a stop  
14 log that would increase the control structure high level to 1459.5 feet. (See Plaintiffs'  
15 Exhibit 159 and 160). The North Dakota State Water Commission and the State Engineer  
16 agreed with the RCWRD and the DLJWRD to have this done and provided funding to pay  
17 for the costs of inundating approximately 277.5 acres because of that additional storage  
18 being accomplished by increasing the elevation by six inches. (Plaintiffs' Exhibit 161).

19 530. The plaintiffs assert that increasing the elevation to 1459.5 feet should be disregarded  
20 because there is insufficient evidence to show that this was anything other than temporary.  
21 Further, they assert the lake was still capable of draw down to 1458 feet in the fall. This  
22 trial court agrees there is insufficient evidence to factually determine what impact, if any,  
23 actually occurred in terms of additional storage as a result of adding this additional six  
24 inches to the outlet control structure. However, there is also insufficient evidence to  
25 determine whether there was a draw down to 1458 feet every year since the inception of the  
26 control structure as presumed by the plaintiffs. It is evident that design plans for the  
27 structure were as much intended to accommodate the storage of additional water in spring as  
28 to ultimately discharge some of it into Dry Lake. The evidence is such that what was  
29 actually practiced is speculative. The structure was designed and modified such that it could  
30 cause Morrison-Sweetwater Lake to hold more water at times and to hold less water at times  
31 based on its natural outlet elevation.

32 Further, based on the motive and intent especially in the addition of the stoplog  
33 modification, it is just as likely that had a draw down not occurred in any given fall, that  
34 excess water in the spring would have flowed out of Sweetwater-Morrison anyway. In other

words, if the stoplog addition was applied as intended, it simply controlled when the additional water discharged, and was not a function of how much more in light of the water budget present in the upper basin by this time period.

531. In any event, by presuming that the elevation of Morrison-Sweetwater Lake was 1458 feet, plaintiffs' calculations by its expert, Cecelio Olivier, were flawed and do not reflect the correct amount, if any, of water volume that may have been released from natural storage in Morrison-Sweetwater Lake. Although an agreement entered into between the North Dakota State Water Commission and the DLBJWRB authorized such a draw down on October 1 of each year (Plaintiffs' Exhibit 163 and Plaintiffs' Exhibit 162), there is no evidence such as annual maintenance reports (such as those that were included with Channel A/Dry Lake) that allows the court to speculate that in fact this occurred.

532. The plaintiffs through the testimony of the expert witness, Cecelio Olivier stated that there was lost storage that occurred as a result of the installation and the operation of the control outlet structure at Morrison Lake. For the years 1988 through 2005 inclusive, the plaintiffs assert that the lower range impact of lost storage resulted in additional waters entering into Devils Lake that would not have otherwise have done so but for the project in the amount of 34,876 acre feet. (See Plaintiffs' Exhibit 334). The plaintiffs assert that for those same years the upper range impact of water that entered Devils Lake as a result of lost storage which would not have otherwise entered the lake was the amount of 71,336 acre feet. (See Plaintiffs' Exhibit 334). In reaching these opinions, the plaintiffs relied upon the following presumptions of fact:

a. Upper range – that the pre-project natural outlet elevation of Morrison Lake was 1460.6 feet.

That Morrison Lakes post project outlet elevation was 1457 feet msl.

That the stop logs at the outlet were never in place.

b. Lower range – that Morrison Lakes pre-project or natural outlet elevation was 1460.6 feet msl.

That Morrison Lakes post project outlet elevation was 1459 feet msl.

That the stop logs at the outlet were in place.

533. Neither the upper range opinion of 71,336 acre feet or the lower range opinion of 34,876 feet offered by the plaintiffs are reliable. This is for the following reasons as well as the other findings set out in this decision:

a. For both the upper range and lower range calculations the plaintiffs used the incorrect natural outlet elevation of 1460.6 feet instead of 1459 feet.

- 1           b. In calculating the upper range calculation the plaintiffs presumed that the  
2 post project outlet elevation was 1457 feet msl. In fact, the outlet structure  
3 had a high level of 1459 feet msl. Although in calculating the upper range  
4 figures, the plaintiffs assert that the Morrison Lake post-project outlet  
5 elevation was 1457 feet msl, there is no evidence to support the opinion that  
6 the structure drew down to that level. In fact Carey Backstrand testified that  
7 the only structure that possibly allowed for that which involved a small  
8 culvert on the side of the weir was never effective and did not work.
- 9           c. For the upper range calculation the plaintiffs presume the stoplogs at the  
10 outlet were never in place. Again, there is insufficient evidence to reach that  
11 determination and it is speculative to have presumed this.
- 12           d. For reasons explained in subsequent findings, the plaintiffs' adoption of the  
13 West Study factor of .1865 to calculate the lost storage discharge was not  
14 reliable. (See Finding 608).
- 15           e. The Y factor used in the formula to calculate the cumulative impact of this  
16 project presumes facts not supported by the evidence and as explained in  
17 later findings. (See Finding 607).
- 18           f. Additional calculations used by Olivier to reach the calculations of annual  
19 impact in Plaintiffs' Exhibit 334 have not been explained in a manner  
20 sufficient to analyze or scrutinize them or otherwise rely on them. (See  
21 Finding 607).

22 534. In terms of lost storage capacity plaintiffs assert through the opinion of their expert witness,  
23 Cecelio Olivier, that the potential impact on Devils Lake was to add water to the lake which  
24 would not have otherwise have entered it but for the projects in the quantities described  
25 above. By further calculation, plaintiffs assert that the low range volume of 34,876 acre feet  
26 constituted .87 percent of the total waters which entered Devils Lake since the beginning of  
27 this project, 1988 and through 2005, and that for the high range volume of 71,336 acre feet,  
28 this constituted 1.77 percent of the total waters for that time period. This is based upon the  
29 total waters entering the lake from the testimony of the plaintiffs' expert from 1988 through  
30 2005 to be 4,025,727 acre feet. As stated in the cases of Knutson v. City of Fargo 2006 N.D.  
31 1997 Sec.9, 714 N.W. 2d 44, our Supreme Court held that:

32           *"To prove inverse condemnation, the property owner must prove that a public*  
33           *entity took or damaged his or her property for a public use and that public use*  
34           *was the proximate cause of the damage."*

In Jones v. Ahlberg 489 N.W. 2d 576, 581 (N.D. 1992) our Supreme Court held that

1 proximate cause was, "*That cause which has a natural and continuous sequence, unbroken*  
2 *by any controlling intervening cause, produce the injury and without which it would not*  
3 *have occurred*". Further, our court in Beilke by Beilke v. Coryell 524 N.W. 2d 607, 609  
4 (N.D. 1994) recognized that proximate cause is a cause which has a substantial part in  
5 bringing about the injury or harm.

6 Even presuming and giving the plaintiffs the benefit of doubt that these calculations are  
7 reliable for the purpose of addressing this issue, this volume of water would not constitute a  
8 substantial part or cause in bringing about any damages or taking claimed by the plaintiffs in  
9 the flooding of their properties. The range of contribution of .87% to 1.77% is too low to  
10 factually constitute a substantial part of any damage or harm incurred by the plaintiffs.  
11 Therefore, as to this project the evidence would be insufficient to establish that this project  
12 was a proximate cause of any harm, damages or taking of plaintiffs' properties as a result of  
13 the increased water levels occurring on Devils Lake.

14 If the inflow volume into Devils Lake claimed by the plaintiffs from the first project in 1957  
15 to 2005, 6,000,727 acre feet, is applied, the impact is even less. The impact as a percentage  
16 of the total inflow volume for this time period would be .58% to 1.19%. Obviously, this too,  
17 is too low by itself to be a substantial cause or factor in bringing about any taking or  
18 damages.

19 All of these possible percentage contributions set out above are extremely low from a factual  
20 standpoint. So, they would be insufficient to find this project was a proximate cause of the  
21 damages and taking claimed by the plaintiffs.

22 535. Giving the benefit of the doubt to the plaintiffs for the purpose of addressing this issue, by  
23 presuming that this project constituted a proximate cause of any harm suffered by the  
24 plaintiffs, the application of N.D.C.C. 32-03.2-02 would be required. That statute requires  
25 as a general rule that any liability for this project as to these particular defendants involved  
26 in it be several liability only, and not joint. By the plaintiffs' own facts offered by them,  
27 they set out a reasonable basis for determining the contribution of the Morrison-Sweetwater  
28 Lake outlet/channel project to the harm allegedly suffered by the plaintiffs to their property  
29 by the increased levels of water entering Devils Lake. Consequently, even if liability was  
30 established, these party defendants involved with the Morrison Lake project would only be  
31 liable for any damages or taking established to the extent of .87 percent on the low range and  
32 1.77 percent on the high range. These would be the percentages applied against the total  
33 damages for which these defendants and this project would be liable based on the time  
34 period suggested by the plaintiffs. When considering the full time period for all projects,

1 this would result in a percentage of damages at .58% to 1.19%.

2 536. The defendant parties that would be liable, if at all, as it relates to the Morrison-Sweetwater  
3 Lake outlet control structure project and channel improvements would be the North Dakota  
4 State Water Commission and its State Engineer who participated in the construction of the  
5 project and also established authorizations for management of it, and also the Ramsey  
6 County Water Resource District which initiated and was involved in the construction of the  
7 project and also its management.

8 537. Plaintiffs allege that one of the projects that was a proximate cause for harm and damages to  
9 their property or the taking of their property were channel improvements within the  
10 Starkweather sub-basin. The Starkweather sub-basin includes portions of Cavalier County  
11 and Ramsey County. The Starkweather Coulee collects waters draining from the sub-basin  
12 and deposit those waters into the north end of Dry Lake. The sub-basin drains 391 square  
13 miles of land. The projects complained of by the plaintiffs were channel improvements that  
14 occurred over two stages and locations.

15 538. The first channel improvements involved the Hammer-Sullivan Township drain area. The  
16 application for it was initiated in March of 1984 by a local farmer to the Ramsey County  
17 Water Resource District. (See Plaintiffs' Exhibit 213). On March 14, 1987 the State  
18 Engineer was notified that the RCWRB had approved the application for the project. In  
19 turn, the State Engineer held a hearing on the proposed project on August 6, 1987.  
20 (Plaintiffs' Exhibit 213). The purpose behind the project was to improve water flow of the  
21 channel. It was the belief of the applicants that the existing channels in the Starkweather  
22 Watershed were not large enough to carry the normal runoff from the land. It was the  
23 conclusion that the water management problem in this watershed was the result of  
24 inadequate drainage. In turn that inadequate drainage caused floodwater inundation and  
25 prolonged wetness along the floodplain area of the coulee. The state engineer approved the  
26 project and permit on December 2, 1987.

27 539. The Hammer-Sullivan drain consisted of thirty-two miles of channel located within the  
28 Starkweather Watershed and sub-basin. The Hammer-Sullivan drain empties into the  
29 Starkweather Coulee one mile south of Garske, North Dakota and one-half mile west of  
30 N.D. Highway 20. The water then flows from the Starkweather Coulee and empties into  
31 Dry Lake.

32 There were two phases of the Hammer-Sullivan drain project. Phase I involved the  
33 construction of the lower seven miles of the drain. Phase II involved the construction of the  
34 remaining twenty-five miles of channel. The channel improvements resulted in a significant

1 amount of excavation to widen and deepen the channel. Phase II resulted in 255,200 cubic  
2 yards of excavation. Phase I was completed in 1989. Work continued on Phase II through  
3 2000.

4 540. The North Dakota State Engineer determined that this project was of statewide or inter-  
5 district significance. The State Water Commission participated in the funding of the project  
6 as well as approval of its design. The Ramsey County Water Resource District funded its  
7 share of the project by determining an assessment area for it.

8 541. The purpose behind the Hammer-Sullivan drain was to improve the channel capacity of the  
9 Starkweather Coulee in that location so that water draining from that part of the sub-basin  
10 would drain more rapidly into the coulee. Once in the coulee the water would naturally flow  
11 into Dry Lake and thereafter Devils Lake.

12 542. In its brief the plaintiffs cite page 104 of Plaintiffs' Exhibit 213. That citation states the  
13 following:

14 *Whatever methodology is used to quantify the impact, it is indisputable that*  
15 *drainage will cause an additional volume of water to be discharged*  
16 *ultimately into Devils Lake and that this additional volume of water, once it*  
17 *arrives in Devils Lake will cause the inundation of additional land. At*  
18 *certain times (such as when Devils Lake stages are high) this is undesirable.*  
19 *There are times (such as when Devils Lake stages are low) when this could*  
20 *be advantageous.*

21 It is important to recognize the context in which this citation from Plaintiffs' Exhibit 213 is  
22 located. That passage is part of a discussion by the author of Plaintiffs' Exhibit 213 of the  
23 amount of water that may be drained and a recognition that such is a hydrologic variable. *Id.*  
24 Previous analysis within the exhibit concluded that the amount of water that may be drained  
25 would not be sufficient to overburden the Devils Lake hydrologic system due to the lake's  
26 high historical variability. *Id.* at p.104. The author then goes on to indicate that there is still  
27 a concern that cannot be eliminated and goes on to make the statement cited by the plaintiffs.

28 However, after that citation offered by the plaintiffs the report goes on to state the following:

29 *The design and other physical aspects of the drain have been developed to*  
30 *prevent serious hydrologic impacts downstream. Some of this effect is due*  
31 *to the sizing of road crossing structures (Exhibit Number 16, Statement 10).*  
32 *A review of the peak stages at these structures in Exhibit Number 10*  
33 *indicated that the stages do not increase. This indicates that these*  
34 *structures are currently serving (inadvertently) as control points. The areas*  
*immediately upstream from these control points should be addressed. If the*  
*sizing of the culverts are selected with the intention of temporarily*  
*impounding water, and if this impounding is a beneficial feature of the*  
*project, then the area which is inundated by that impounding is adversely*

1           *affected by the project.*

2           *The duration of flows is decreased by the project, according to the project*  
3           *engineering report (Exhibit Number 16). Therefore, there will be no*  
4           *impacts from sustained flows.*

5           Consequently, the citation offered by the plaintiffs in context to the entire passage in  
6           Plaintiffs' Exhibit 213 recognizes that even though there was a concern there were other  
7           factors in play that significantly diminished that concern. Those factors included other  
8           channel impediments, intended or not, that would tend to impound water relative to the rate  
9           of flow and volume at any given time.

10          543. It is evident from the nature of the construction and work done on the Hammer-Sullivan drain  
11          project as described above that it did result in improving channel capacity and flow so that  
12          water would drain more quickly out of the Starkweather Coulee in that area of the Hammer-  
13          Sullivan drain and eventually into Dry Lake.

14          In reaching his determination, Stephen Hoetzer's opinion testimony relating to the impact of  
15          this project has not been considered. It is ambiguous. At one point he said that based on his  
16          view of the site and without review of the plans he could not offer an opinion of whether  
17          there was an improvement of channel capacity. In later testimony, he stated that based on the  
18          review of the site; i.e. visually looking at it, and from his experience with other projects it  
19          increased the natural capacity two to four times. Considering these nearly opposite  
20          statements, this court declines to rely on either.

21          544. Even though the improvements resulted in the more rapid drainage of water it must be  
22          recognized that the first phase of the Hammer-Sullivan drain project was accomplished in  
23          1989. As noted previously, that was only seven miles of construction. The balance of it,  
24          twenty-five miles of channel, was not accomplished until at least the year 2000. By that time  
25          Devils Lake had reached an elevation of 1446.36 feet at its highest in that year and was even  
26          higher the previous year. So, by the time this project was completed, many of the properties  
27          that the plaintiffs claim were damaged were already inundated or damaged.

28          545. The second component of work on the channels of the Starkweather Coulee occurred with an  
29          application to the North Dakota State Engineer in February of 1991 by the Ramsey County  
30          Water Resource District. The purpose of the application was to clean out and widen the  
31          Starkweather Coulee and to make some channel realignments to improve the hydrologic  
32          characteristics of the channel so as to reduce flooding to surrounding cropland along that  
33          portion of the coulee. This project involved actual improvements to the coulee itself and its  
34          channel. On the other hand the Hammer-Sullivan drain was the creation of a new channel  
35          area.

1 546. The 1991 project was deemed to be of statewide or inter district significance. The drainage  
2 area for the improvement was calculated to be 266 square miles. The length of the channel  
3 improvement was 69,606 feet (slightly more than 12 miles). It included the proposal to  
4 widen the channel bottom to 30 feet and to have a 4:1 side slope.

5 This project was also divided into two stages. The first stage involved 4.1 miles of channel  
6 improvements at the lower end of the Starkweather Coulee. It involved the excavation of  
7 92,705 cubic yards of materials. The second phase of the project was 3.6 miles of channel  
8 construction. That resulted in the excavation of 70,381 cubic yards of materials.

9 This work widened and deepened the channel and increased its capacity to carry water.  
10 Phase I of this project was not started until 1995. It is not evident when the second phase was  
11 started and both phases completed. Also, there is no suffered evidence, indicating the  
12 channel capacity prior to the start of this project on Starkweather Coulee.

13 547. It was the opinion of the plaintiffs' expert, Cecelio Olivier, that all the channel improvements  
14 to the Starkweather Coulee, including the Hammer-Sullivan drain, caused a greater volume  
15 of water to reach Devils Lake than would have naturally occurred without the project. The  
16 defendants correctly note that the plaintiffs' cite to Mr. Olivier's testimony at T.T. Vol. 7  
17 p.1413-14 does not support this finding. That testimony only relates to Mr. Olivier's opinion  
18 that the improvements effectively reduced flooding along the channel. This court is satisfied  
19 later testimony by Mr. Olivier generally stated or reasonably inferred his opinion relating to  
20 the Starkweather Coulee projects.. In any event, Olivier and EOR have not quantified what  
21 this greater volume of water is that was attributable to this particular project. There was no  
22 evidence of prior channel capacity or even when these projects were completed. It would be  
23 speculative with the limited evidence available to suggest what impact or contribution this  
24 project had on the water elevation increases experienced on Devils Lake..

25 548. This court finds that a reasonable inference can be made from the evidence that a greater  
26 volume of water would have potentially entered into Devils Lake through Dry Lake than  
27 would have naturally occurred because of either this main channel improvement project in  
28 the Starkweather Coulee or the development of the Hammer-Sullivan drain. However,  
29 without some evidence that allows this court to do so and based on the evidentiary  
30 shortcomings noted in the previous and later findings, no reasonable inference can be made  
31 that the Starkweather Coulee projects were a substantial part or cause in bringing about the  
32 increased volumes of water that have discharged into Devils Lake over the past several years.  
33 Consequently, the plaintiffs have failed to establish that these two projects in the  
34 Starkweather Coulee and sub-basin were a proximate cause of any damages or harm to the

1 plaintiffs' properties claimed by them as a result of any increased waters flowing into Devils  
2 Lake since these projects began in 1989 and with some of them not completed until at least  
3 2000. Any liability that might attach would be to the Ramsey County Water Resource  
4 District and the North Dakota State Water Commission.

5 549. The plaintiffs claim that the Grand Harbor drain and pump station is a project by one or more  
6 of the party defendants which has caused their properties to be damaged or taken. The Grand  
7 Harbor drain and pump station is a project that has evolved from a group of landowners  
8 initiating drain efforts to the involvement of multiple interest groups in addressing different  
9 concerns existing in the Devils Lake Basin. That evolution of this project will be explained  
10 in the following findings.

11 550. In the 1970's farmers in the area west of Dry Lake and north of U.S. Highway 2 experienced  
12 sheet water flooding which did not adequately drain to allow them to farm their land.  
13 Consequently, private drainage efforts were initiated to move this water through the sub-  
14 basin more effectively. Landowners initiated efforts as early as 1975 to obtain relief of their  
15 drainage problems with the Ramsey County Water Management District. In spite of their  
16 individual efforts any water draining tended to be obstructed by man made objects such as  
17 roadways and the railroad. Opposition existed from landowners on the south end of the  
18 Grand Harbor drainage area by actions of those on the north end. It was believed that the  
19 railroad was improperly culverted.

20 551. As a result of these local efforts, an application for a permit for drainage and pumping was  
21 made by the Ramsey County Water Management District to the North Dakota State Water  
22 Commission in October of 1984. (See Plaintiffs' Exhibit 102). The State Engineer  
23 determined that the proposed project would be of statewide or inter district significance.  
24 That would require public hearings. As a consequence, the Ramsey County Water  
25 Management District Board scaled down the project and made new application in January of  
26 1986 to the State Water Commission. In that new application the State Engineer determined  
27 that the application did not involve drainage of statewide or inter district significance. As a  
28 result, no permit from the State Water Commission was required. Instead, the application  
29 was approved by the Ramsey County Water Management District through its chairman,  
30 Robert Garske, on March 11, 1986.

31 552. The application as approved in 1986 involved developing a drainage area that would  
32 discharge into Dry Lake and the Grand Harbor Coulee. It would encompass a watershed area  
33 of approximately 8500 acres. This area was north of U.S. Highway 2 and west of Dry Lake.  
34 The proposed drainage ditch was to be approximately five feet wide at the bottom with a side

1 slope of 3:1 and a five foot depth. It was projected that the capacity of the drain would be  
2 100 cfs. It was computed that the annual yield that would result from this drainage project  
3 including the installation of pumps would be 400 acre feet of water which at that time would  
4 raise the lake level by .013 inches. This was an annual calculation. (See Plaintiffs' Exhibit  
5 100). As indicated, the project included a pumping station. This was located at a position  
6 just north of U.S. Highway 2 to drain the water over the Burlington Northern railroad tracks  
7 to the south. A ditch block was put in place to prevent water from flowing back to the north.  
8 By 1983 all of this was in fact constructed as revealed by an inspection report accomplished  
9 by Craig J. Bless of the North Dakota State Water Commission in May of 1989 from an  
10 inspection occurring on April 26 by he and Carey Backstrand. (Plaintiffs' Exhibit 102).

11 553. In August of 1987 the United States Fish and Wildlife Service became concerned with the  
12 drainage efforts in the Grand Harbor area due to the Grand Harbor Drainage Project. This  
13 was because it had a number of wetland easements in the area. The USFWS was concerned  
14 that these wetlands which could not be lawfully drained, may be impacted by the project.  
15 When the permit was issued by the Ramsey County Water Resource District in March of  
16 1986 the district board did provide the following condition:

17 *That the Ramsey County Water Management Board shall have the authority*  
18 *to shut down all pumping operations if it is determined that the water flow*  
19 *has a negative impact on landowners below the drain.*

20 554. Subsequent to the establishment of this drain and pump station, additional investigations  
21 were pursued with cost participation by the North Dakota State Water Commission and the  
22 Ramsey County Water Resource District. One study was authorized in 1990. A second  
23 study was authorized in 1992. In 1993 an agreement was entered into between the North  
24 Dakota State Water Commission and the Ramsey County Water Resource District for the  
25 Grand Harbor Watershed Management Project. As a condition of cost sharing the Ramsey  
26 County Water Management District was to be responsible for carrying out an effective and  
27 ongoing program of continued maintenance for the project and obtaining all applicable  
28 permits prior to construction. The project was labeled as the construction of the "Grand  
29 Harbor Watershed Management Project." (Plaintiffs' Exhibit 105).

30 555. Because of the concerns of downstream landowners, the northern landowners who sought to  
31 improve the drainage of their farmlands, the US Fish and Wildlife Service, and the North  
32 Dakota Wetlands Trust, cooperative efforts were made to resolve these concerns. That  
33 resulted in a management agreement reflected in an executive summary which is Plaintiffs'  
34 Exhibit 108. The drain was allowed to have a northern extension added to it, but with the  
elimination of another planned lateral drain.

1 556. The installation of a 20 cfs pump station downstream near the end of the lateral Grand  
2 Harbor drain "A" near U.S. Highway 2 was authorized.

3 557. Fifteen project control gates for surface water management and mitigation was to be included  
4 in the project. It was further provided that surface water would be retained by those gates on  
5 356.4 acres.

6 558. The restoration of the Kenner Marsh and associated wetlands were to be accomplished as part  
7 of the mitigation process. Perhaps most importantly, mitigation of wetland losses were  
8 required as set forth in Plaintiffs' Exhibit 108. As a result of this, two things happened.  
9 First, wetland restoration and mitigation of 843.6 acres of wetland, the pre-project wetland  
10 base, was accomplished. Second, an additional 349 acre feet of wetland was acquired by  
11 additional restoration of the Kenner Marsh. (See Plaintiffs' Exhibit 108 and Plaintiffs'  
12 Exhibit 110). In fact, there were even additional wetlands restored that were not included on  
13 the Kenner Marsh tract. This increased storage to 383 acre feet for a net gain in the Kenner  
14 Marsh restoration. (Plaintiffs' Exhibit 110).

15 559. The parties dispute whether or not the Grand Harbor project caused more water to flow into  
16 Channel A and then into Devils Lake than would have done so without the project. The  
17 plaintiffs contend that it did cause more water to flow into Devils Lake than would have  
18 otherwise done so. They rely particularly on the testimony of Steven Hoetzer and his  
19 conclusions. But, he testified he was not familiar with the current operation of this project.  
20 He agreed mitigation by restoration of wetlands occurred. At some year in the past which he  
21 could not recall, he saw one pump operating. His last visit two weeks before trial revealed  
22 that there was no pump at the site. Even one of the plaintiffs, Daniel Webster, agrees that  
23 this project did not have the same character as the other projects identified by the plaintiffs.  
24 The defendants assert that if anything the Grand Harbor project drain and pump station stored  
25 more water rather than drained more water.

26 This court finds that it is more likely that the Grand Harbor drain and pump station resulted  
27 in a greater but undetermined quantity of water being stored upon completion of the project  
28 because of the mitigation requirements ultimately established in 1995. At that time it should  
29 be noted that the level of the lake was only 1435.88 feet at its highest elevation. In any event,  
30 it is fairly evident that by 1995 with the implementation of the mitigation conditions this  
31 would have reduced if not eliminated any impact on Devils Lake. There is even a more  
32 reasonable likelihood it increased storage.

33 560. By 1995 when the management committee for this project was established it included two  
34 landowners and a representative from the fish and wildlife service and the North Dakota

Wetlands Trust. It did not include the State Water Commission or State Engineer as a committee member, nor any of the other party defendants.

561. Considering all of the above, this court cannot find there is sufficient evidence to conclude from the calculations and opinions offered by the plaintiffs that this project or any of the party defendants that may have been involved in it, contributed to the harm or damages that the plaintiffs claim. Consequently, the plaintiffs failed to show by a preponderance of the evidence that this project was a proximate cause of or that they suffered any damages or taking as a result of the Grand Harbor drain and pump station project.

562. Even if the plaintiff showed some amount of damages or taking as a result of the Grand Harbor drain and pump station, they have failed to show that this would constitute a proximate cause of those damages. See Knutson v. City of Fargo, *supra*; Jones v. Alberg, *supra*; and Beilke by Beilke v. Coryell, *supra*. This is because the quantity of water which annually would have resulted, at least up to 1995 and based on the plaintiffs' claims would have been no more than 400 acre feet of water. Even presuming that this amount was contributed from 1987 to 1995 when the mitigation efforts were accomplished and to address this issue, this would only total 3200 acre feet of water without considering any other factors in mitigation. It does not even take into account evaporation. Applied against 6,000,727 acre feet of water, this would only constitute .05 percent of the total volume. Applied against 1,205,071 acre feet of water it is only .27% of that total based on the total inflow volumes of water into Devils Lake from 1987 to 1995 inclusive. All these percentages are insufficient to constitute a substantial cause or part in bringing about any damages or harm to the plaintiffs' property as they claim. Therefore, this also would preclude any finding of proximate cause attributable to this project.

Finally, after 1995 wetland mitigation requirements described above would have likely ended any contribution to Devils Lake due to this project.

563. The plaintiffs allege that the Creel Bay Dike was a project that had a direct effect of raising the level of Devils Lake that would not have otherwise have done so in the absence of the project. All of the party defendants deny participation in this project and assert that they should not be subject to any liability for damages or taking as a result of it.

564. The Creel Bay Dike is a levy that was originally constructed by the United States Army Corps of Engineers in 1984. (See Plaintiffs' Exhibit 516.) It was located in parts of Sections 12, 9 and 5 of Township 153 North, Range 64 West and in Section 31 and Section 32 in Township 154 North and Range 64 West in Ramsey County. The purpose of the levy was to protect the city of Devils Lake from lake levels that continued to climb over the years. This

1       levy was commonly referred to as the Creel Bay Dike as it was located adjacent to Creel Bay  
2       of Devils Lake. It was also known as the Devils Lake Levy.

3       565. On June 3, 1996 the city of Devils Lake applied for a permit from the State Water  
4       Commission to increase the height of the levy to add further protection to the city of Devils  
5       Lake from lake levels of 1445 and up to 1450 feet. *Id.*

6       566. In accordance with its discretionary duties, the North Dakota State Engineer granted a permit  
7       to the city of Devils Lake for the improvements sought for the Creel Bay Dike. The approval  
8       was executed by the State Engineer on August 4, 1996.

9       567. The levy was 28,700 feet long. It was designed to protect an area of land of approximately  
10       4,083 acres. Upon completion of the modifications the top of the levy would be ten feet  
11       wide, the side slope on the water slope would be 15:1. The side slope for the land side of the  
12       levy would be 3:1. It was anticipated that the maximum height of the levy would be  
13       seventeen feet. It was the opinion of the plaintiffs' expert, Cecelio Olivier, that given the  
14       current elevation of Devils Lake at the time of trial, the Creel Bay Dike would eliminate  
15       32,000 acre feet of storage that would otherwise be available except for the existence of the  
16       dike. The amount of lost storage would be subject to the height of the waters of Devils Lake  
17       behind the levy.

18       568. No evidence has been presented that any of the water resource management districts,  
19       including Ramsey County Water Resource Management District was involved in this project.  
20       Further, the issuance of a permit was merely a discretionary function of the State Engineer  
21       and that act, including any acts by the State Water Commission do not result in liability by  
22       them for this project.

23       569. The defendant cites Plaintiffs' Exhibit 128 in its brief to support its claim that the North  
24       Dakota State Water Commission is somehow liable for any damages or taking that come  
25       from the Creel Bay Dike project. That exhibit is an agreement dated May 31, 1983 whereby  
26       the North Dakota State Water Commission agreed to grant funds to the city of Devils Lake to  
27       obtain and then stockpile rock rip rap in the vicinity of the "dump ground road and the city  
28       sewer lagoons". The purpose of the rock rip rap was to have it stockpiled to be used on an  
29       emergency basis by the city to protect the structural integrity of the dump ground road where  
30       it crosses Creel Bay. The plaintiffs have offered no other evidence that in fact this rip rap  
31       was used. In fact a review of page 493151 and 493165 of Exhibit 128 would allow for a  
32       reasonable inference that the Creel Bay Dike was placed at a different location and not at all  
33       near the sewage disposal ponds or its access road. The court acknowledges that it is not clear  
34       if the access road to it was different than the "dump ground road". In any event, it is evident

1 that Plaintiffs' Exhibit 128 and what is provided for in it was not a component of or part of  
2 the Creel Bay Dike.

3 570. Based upon all of the above, none of the party defendants are liable for any damages or  
4 taking that plaintiffs claim occurred as a result of the improvements made after 1996 to the  
5 Creel Bay Dike. Liability, if any, likely falls with the city of Devils Lake who is not a party  
6 to this litigation.

7 571. It is further found by this court that the displacement or loss of storage capacity as a result of  
8 the presence of the Creel Bay Dike would not be a substantial part or cause for any damages  
9 or harm to their property claimed by the plaintiffs. The quantity of water displaced relative to  
10 the total discharge of water into Devils Lake during this time would not be a substantial part  
11 in bringing about any damages or taking claimed by the plaintiffs. The volume of 32,000  
12 acre feet would only be .5% of the total volume of 6,000,727 discharging into Devils Lake  
13 from 1957 to 2005. All of these possible percentages contributions are extremely low from a  
14 factual standpoint. So, they negate a finding of proximate cause as to this project just based  
15 on this. See Knutson v. City of Fargo, supra; Jones v. Alberg, supra; and Beilke by Beilke v.  
16 Coryell, supra.

17 572. The plaintiffs claim that the removal of the Iverson Dam in 1997 contributed to the damages  
18 or taking of their property as they claim in their complaint. Iverson Dam was built in the  
19 1930's. It is located on the Little Coulee between Hurricane Lake and Lake Ibsen,  
20 approximately two to two and one-half miles north of U.S. Highway 2. The dam was  
21 originally constructed by the Benson County Water Management District.

22 573. In 1972 the Benson County Water Management District proposed to repair the Iverson Dam.  
23 A study was completed by the North Dakota State Water Commission for that purpose and  
24 concluded the cost would be \$70,000.00. The BCWMB determined that would be too  
25 expensive and they hired a local contractor to perform repairs at a cost of \$15,000.00. The  
26 North Dakota State Water Commission refused to approve the proposed method of repair  
27 because it was under designed. Regardless, the Benson County Water Management District  
28 proceeded to make the proposed repairs. These repairs were totally inadequate to protect  
29 against a one hundred year flood. (Plaintiffs' Exhibit 72).

30 574. The high floodwaters feared by the State Water Commission occurred in the spring of 1997.  
31 In April of 1997 during spring flooding, the State Water Commission received a phone call  
32 that the dam had serious problems and had the potential for breaching. The Division of  
33 Emergency Management was notified. People downstream from the dam in Leeds, North  
34 Dakota were evacuated.

1 A water commission construction crew was mobilized and upon arrival at the dam they found  
2 it in near collapse. Working all night the crew was able to stop the uncontrolled failure.  
3 Then, over the next few days the dam was completely lowered. Later the dam was repaired  
4 by a stop log structure. Stephen Hoetzer testified he observed it and its retention of water by  
5 two 12 inch stop logs in the culvert only weeks before trial. So, to some extent the dam was  
6 replaced.

7 575. The top elevation of Iverson Dam was 1535 feet msl. When removed the water flowed  
8 through that area at 1525 feet msl. Based upon this it was the opinion of the plaintiff's  
9 expert, Cecelio Olivier, that approximately sixty acre feet of storage was lost in the upper  
10 basin as the result of the dam's removal. Further, Mr. Olivier concluded that there was a  
11 cumulative effect of the lost storage for subsequent years.

12 576. In calculating this lost storage for 1997 of sixty acre feet and then inferring that this would  
13 cumulatively occur in subsequent years, Mr. Olivier included this in his calculations for the  
14 additional waters that would have entered the lake but for the removal of the dam. This dam  
15 was not part of the natural drainage system that had developed in the Devils Lake upper basin  
16 over time. Rather, since the 1930's as pointed out by the defendants, this dam served the  
17 function of storing water of an amount of potentially sixty acre feet each year. Consequently,  
18 even if those prior years were disregarded until 1977 the storage benefits that would have  
19 been gained by the existence of Iverson Dam far outweighed any lost storage as a result of the  
20 removal of the dam. The specific amount is beyond this court's ability to calculate from the  
21 evidence provided. However, common knowledge and science allows for the reasonable  
22 inference that its impact was to help keep more water out of Devils Lake over its lifetime  
23 than what came in after its removal.

24 577. In any event, considering the small volume of water that was retained by Iverson Dam and  
25 the short duration of time that the dam no longer provided a storage function of any  
26 measurable amount, the opinion by the plaintiff's expert, Cecelio Olivier, that this dam's  
27 removal would have had a significant impact on the waters that entered Devils Lake that  
28 would not have otherwise occurred is not supported by the evidence. Plaintiffs have failed to  
29 prove that by these facts that work performed on this dam was a proximate cause of any  
30 damages or taking claimed by the plaintiffs.

31 This is based on the following:

- 32 a. Over the decades of its existence, the dam also stored water, both before and  
33 after the 1997 work, but plaintiffs fail to acknowledge this.
- 34 b. Use of the .1865 factor in calculating lost storage discharge was unreliable

1 for reasons set out in subsequent findings. (See Finding 608). Additional  
2 calculations, if any, used by Olivier to reach his opinion has not been made  
3 evident.

4 c. The small volume of water asserted by plaintiffs to have discharged into  
5 Devils Lake due to lost storage was so small, that this by itself was sufficient  
6 to preclude a finding of probable cause for any taking, damages, or harm. It  
7 could not be determined to be a substantial part or cause.

8 d. Plaintiffs expert has failed to consider the impact created in retaining water  
9 by the fact that the dam was replaced with a stop logs structure and again  
10 retains some volume of water by two 12 inch stop logs.

11 There is a second reason proximate cause has not been proved for this project. As noted by  
12 the defendants in their citation to Defendants' Exhibit 2246, it would take over 8,000 acre  
13 feet for Devils Lake to rise from 1440.0 to 1440.1 feet msl. The discharge of 60 acre feet  
14 of water annually since 1997 as claimed by the plaintiffs is much less. This can hardly  
15 constitute a substantial part in bringing about the rise of Devils Lake.

16 Based on all the findings in this decision, the plaintiffs have failed on this basis to establish  
17 that the removal of this dam in 1997 from Little Coulee constituted a proximate cause of the  
18 damages or taking of the plaintiff's property as claimed. The removal of the Iverson Dam  
19 was not a substantial factor or part in bringing about the rise of Devils Lake. See Knutson v.  
20 City of Fargo, *supra*; Jones v. Alberg, *supra*; and Beilke by Beilke v. Coryell, *supra*.

21 578. In addition, this court agrees that the conduct of the State Water Commission in draining the  
22 water from the dam in 1997 is not conduct which may constitute an inverse condemnation  
23 claim under these circumstances. This is for two reasons. First, the emergency  
24 circumstances support the actions taken by the employees of the State Water Commission,  
25 and no liability should flow from that. As stated in part at N.D.C.C. 61-16.1-01,

26 " . . . it is hereby declared to be the policy of this state to provide for the . . .  
27 protection of water resources and for the prevention of flood damage in the  
28 watershed of this state and thereby to protect and promote . . . the safety . . .  
29 of the people of the state."

30 To the contrary, had they failed to act, significantly greater harm and loss of life was  
31 potentially present. Second, removal of the dam ultimately restored the area closer to its  
32 natural condition. That is exactly what plaintiffs have claimed defendants should have done  
33 by the theory of their case.

34 579. As previously cited by the court, it is recognized in North Dakota that to prove a claim for  
inverse condemnation the property owner must 1) prove that a public entity took or damaged

1 his or her property for a public use, and 2) that public use was a proximate cause of the  
2 damage. Knutson v. City of Fargo 2006 N.D. 97, ¶9; 714 N.W. 2d 44. As a component of  
3 the first element, a taking of the person's property, our Supreme Court stated in Knutson v.  
4 City of Fargo, *supra* at ¶13:

5 *Under the North Dakota Constitution, inverse condemnation requires a*  
6 *public entity's taking or damaging an owner's property by some deliberate*  
7 *act, whether done intentionally, negligently, or innocently.*

8 Our Supreme Court has also ruled that as a component to the element of proximate cause 1.)  
9 the cause must be one which in natural and continuance sequence, produces the injury and  
10 without which the injury would not have occurred Beilke by Beilke v. Coryell 524 N.W. 2d  
11 607, 608 (N.D. 1994); 2) it must appear that any damage was the natural and probable result  
12 of the conduct, and that it ought to have been foreseen or reasonably anticipated by the  
13 defendant as the probable result of that conduct, Beilke by Beilke v. Coryell *supra* at p.609;  
14 and 3) it is a cause which had a substantial part in bringing about the injury either  
15 immediately or through happenings which follow one another. Beilke by Beilke, *supra* at  
16 p.608-609. Without establishing from the evidence all of these components of proximate  
17 cause for an inverse condemnation claim, the claim fails.

18 580. The defendants claim that the plaintiffs have failed to establish that any damages or harm  
19 suffered by them as a result of the increased water elevations of Devils Lake was proximately  
20 caused by any actions on the part of the defendants either in concert or individually.  
21 Particularly, defendants claim that plaintiffs have failed to establish an evidentiary bridge  
22 between the plaintiffs' claimed damages found by this court and the defendants' actions as it  
23 relates to these identified projects. Further, the defendants also assert that in any event any  
24 damages or harm attributed to the defendants or either of them would not have been a  
25 substantial part in bringing about the harm or damages suffered. Next, defendants assert that  
26 the consequences claimed by the plaintiffs were not foreseeable or reasonably anticipated  
27 even if there is otherwise established some degree of causation in fact. Finally, defendants  
28 also contend that even if proximate cause was established that other evidence exists that  
29 constitutes an "act of God" affirmative defense. In support of all of these assertions the  
30 defendants have offered the testimony of Leon Osborne as well as Gregg Wiche.  
31 Consequently, an evaluation of their testimony and evidence presented through them is  
32 appropriate.

33 581. Leon Osborne has an extensive resume of education and experience in the field of  
34 meteorology. He received a BS degree in physics in 1976. That was followed by a master's  
degree in meteorology in 1979.

1 In 1978 he joined the University of North Dakota, Division of Research within the aviation  
2 department. In 1982 he became an assistant professor in the Department of Atmospheric  
3 Sciences at UND. In 1985 he was promoted to an associate professor within that department.  
4 In 1997 he became a full professor there. In 1990 he also expanded his role of activities to  
5 become more involved in the use of geospatial technologies within the Department of  
6 Atmospheric Sciences.

7 Since at least 1997 when he became a full professor he has maintained not only his academic  
8 responsibilities but was engaged and still continues university research activities. Osborne is  
9 currently a Chester Fritz Distinguished Professor of Atmospheric Sciences and Director of  
10 the university's regional weather information center. He maintains teaching responsibilities  
11 both at the undergraduate and graduate level teaching courses in mesoscale meteorology and  
12 surface transportation weather at the undergraduate level and mesoscale meteorology and  
13 general circulation and numerical weather prediction at the graduate level. Osborne has also  
14 taught courses in synoptic meteorology and computer concepts in meteorology. He also  
15 developed a curriculum for radar meteorology courses and taught them at UND for  
16 approximately six years.

17 Osborne has published a number of papers as reflected on his CV, including Defendant's  
18 Exhibit Number 3024A. He participated in a publication with Gregg Wiche entitled  
19 "Climatology, Hydrology and Simulation of an Emergency Outlet Devils Lake Basin in North  
20 Dakota." That was accomplished in June of 2000. He also accomplished a study on behalf  
21 of the United States Army Corps of Engineers which resulted in a publication entitled "An  
22 Overview of the Red River Valley Winter (1996-1997)." This study caused him to look at the  
23 weather systems of the Devils Lake Basin.

24 582. As Osborne testified, weather radar is a primary source of information used to not only  
25 initialize weather prediction models but to use as a diagnostic tool to ascertain the evolution  
26 of storm systems as they relate to mesoscale and synoptic scale features in the atmosphere.  
27 Osborne explained that mesoscale meteorology is the understanding of the physics and  
28 mathematics associated with weather phenomena that is typically less than one hundred  
29 kilometers in horizontal resolution. He explained that synoptic meteorology is the  
30 intermediate range between mesoscale meteorology and general circulation, and involves a  
31 horizontal scale of approximately two thousand kilometers and the evolution of storm  
32 systems on a scale just above that of mesoscale meteorology, or in other words the evolution  
33 of a storm system as it relates to the jet stream.

34 583. Beginning in 1997 Osborne initiated a study through a company in which he is a member

entitled Meridian Environmental Technology, Inc. That study in a report dated March 11, 2002, is Defendant's Exhibit Number 3024. The study or report is entitled "*An Analysis of Atmospheric Water Resource Variations Across the Devils Lake Basin During the 1990's*". It was initiated at the request of the defendants.

The purpose of the study and preparation of the report was threefold. First, it was to perform a detailed temporal and spatial analysis of precipitation across the Devils Lake Basin for a study period from January 1, 1990 to December 31, 2000. Second, it was to do a detailed spatial and temporal analysis of evaporation across the Devils Lake Basin for the same time period. Third, it was to do a comparison study using the findings accomplished in the intensive time period of January 1, 1990 to December 31, 2000 and relate those findings to the longer period of record existing within weather data archives.<sup>7</sup> In other words, once an analysis of the precipitation data and evaporation data was accomplished for the time period specified of January 1, 1990 to December 31, 2000, the results of that analysis was to be compared to weather data from archives over a much longer time period to determine if the region had experienced any climate change.

584. In completing this report and pursuing these areas of analysis, Osborne was required to access and review a significant volume of data. It included reviewing available weather information that was maintained in a physical framework that would provide a detailed analysis of information at individual time periods. Those time periods were broken down to intervals of every hour during the ten year time period. The spatial analysis was reviewed in a four kilometer by four kilometer pattern. Data was also reviewed that allowed for an analysis of the atmosphere at different levels up to an altitude in excess of 3300 feet to support the level of detail needed.

All available weather input data was utilized if possible. This included looking at hourly weather observations collected from airports from mesonetworks, observations collected by weather balloons, and aircraft observations. In addition, weather satellite data was obtained along with weather radar data where available.

To insure consistency in the study this data was collected not only for the area of the Devils Lake Basin, but in the area extending across most of North Dakota, South Dakota, western Minnesota and the southern portions of Manitoba.

To provide reliance to the assimilation of all of the data from different sources, analysis was

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<sup>7</sup> As explained by Osborne, temporal analysis involves the analysis of conditions as those conditions change over time or as they exist at discreet time intervals. Spatial analysis involves looking at variations in space in east/west/north or south of a particular weather phenomenon.

1 accomplished by use of a larger weather prediction model that was executed by the National  
2 Oceanic and Atmospheric Administration National Centers for Environmental Prediction.  
3 Because much of the data was in digital format, that together with the translation of data  
4 allowed for the evaluation. In any event, virtually all of the data was collected from either  
5 the National Weather Service or by various agencies within the National Oceanic and  
6 Atmospheric Administration. Osborne estimated it took approximately 1500 person hours to  
7 accomplish the gathering of the data and analysis.

8 585. As cited by the report, the Devils Lake Basin is located in a humid continental, cool summer  
9 climate which is characterized by comparatively warm but short summers and long cold  
10 winters. This results in variability in temperature and precipitation not only from year to  
11 year, but within a given year. Within the basin the temperature ranges have been as high as  
12 112 degrees Fahrenheit to as low as 46 degrees Fahrenheit below zero.

13 Precipitation averages 18.6 inches annually. The majority of the region's precipitation during  
14 a given year occurs during the spring and summer months, April through September.

15 586. In evaluating the weather patterns and the climate change observed by Osborne as hereafter  
16 described in subsequent findings, it was emphasized by Osborne and recognized by this court  
17 those weather events occurring globally will impact the weather events more locally,  
18 including those in the Devils Lake Basin. Osborne testified that the ultimate driving force in  
19 weather events is radiation from the sun. As it relates to the northern hemisphere, the sun has  
20 greater impact on the air near the equator and so heats the waters and atmosphere to a greater  
21 temperature at that location. As this happens, the entire atmosphere tries to balance its  
22 temperature. Consequently, and relative to this action, circulation of the air within the  
23 atmosphere of the northern hemisphere occurs. This is occurring over both land and ocean  
24 surfaces. However, there is greater impact over the oceans as the oceans also absorb heat and  
25 then gives off additional heat into the atmosphere. All of this is happening over a period of  
26 time as the atmosphere seeks out a temperature balance.

27 There are three circulation patterns in the northern hemisphere that have major influences on  
28 the polar jet stream. Their influence is to create blocking features and anomalies as it relates  
29 to the jet stream. This in turn impacts the northern plains' weather, including that of the  
30 Devils Lake Basin. These three circulation patterns that impact our area include the El Niño  
31 Southern Oscillation (ENSO), the Pacific North American Oscillation (PNA), and the North  
32 Atlantic Oscillation (NAO).

33 The El Niño circulation pattern has global impact. As it relates to the northern plains and the  
34 Devils Lake Basin, it impacts it through the variations of sea surface temperatures which in

1 turn account for dramatic variations and precipitation in the equatorial Pacific. This in turn  
2 can produce variations in precipitation and temperature in the northern plains of the United  
3 States. These variations can be long term and can span decades.

4 The El Niño Southern Oscillation and its structure impacts the Pacific North American  
5 Oscillation (PNA) and the North Atlantic Oscillation (NAO). These two circulation patterns  
6 perform what is described as forcing functions on the jet stream. The orientation of the PNA  
7 and the NAO is what directly causes the orientation of the jet stream. As it relates to the  
8 PNA circulation pattern, this produces a control in the positioning of the jet stream both in  
9 terms of latitude and longitude. The NAO circulation pattern also impacts the jet stream.  
10 Even though this pattern is downstream from the jet stream, it impacts it by creating blocking  
11 features that increase the longitudinal or meridional flow across the United States, and this  
12 may increase the moisture invection from lower latitudes.

13 The orientation of the jet stream impacts the frequency of storm systems and moisture that  
14 track into the Devils lake Basin. As the orientation of the jet stream shifts to a flow from  
15 southwest to northeast, it in turn pulls up moisture and low pressure systems from the Gulf of  
16 Mexico. So, as the jet stream takes on a more meridional location, that allows polar air  
17 masses to extend into lower latitudes and warm, moist tropical air masses extend into higher  
18 latitudes. When the two masses collide the warm, moist air masses get lifted, the moisture  
19 condenses, and then precipitation occurs. It is when these weather patterns take on an  
20 alteration of sorts over time that a regional climate change can occur. Osborne reaches a  
21 conclusion and opinion that there has been a change in the climate of the region that includes  
22 the Devils Lake Basin as a result of a shift in the air circulation patterns and jet streams as  
23 described above. Part of the manifestation of that Osborne opines is the greater frequency  
24 and intensity of storm events over the Devils Lake Basin.

25 587. From his analysis of the data that he acquired for study, it is the opinion of Osborne that there  
26 has been a change in the climatic conditions of the region as described above encompassing  
27 the Devils Lake Basin. It is also Osborne's opinion that this climate shift or change  
28 commenced in the late 1970's and is part of a 120 year weather cycle. Having reviewed the  
29 analysis offered by Osborne in his testimony and the report contained in Defendant's Exhibit  
30 3024, this court agrees and finds that there has been a climatic shift or change of a significant  
31 duration for the region that encompasses the Devils Lake Basin. This court is not prepared to  
32 find that the change is part of a 120 year cycle - only that it is one of a significant duration.  
33 This finding is based upon the following:

34 a. The data gathered for this analysis was extensive and detailed. It included

gathering data from the following:

1. Daily total precipitation and other weather information from five observation sites within the Devils Lake Basin maintained by the National Weather Service. Those five sites included observation sites at Rolla, Leeds, Edmore, Devils Lake, and Cando. This was for a time period of 1990 to 2000, inclusive.
2. Precipitation observations found acceptable for the growing season of April 1 through September 30 at seventy-two other locations within the Devils Lake Basin maintained by the North Dakota Atmospheric Water Resources Board. This was for the time period 1990 to 2000 inclusive.
3. National Weather Service weather radar allowing for the estimating of spatial and temporal precipitation values. This was for the time period of January of 1994 through 2000. For most of this time period the daily radar estimation of precipitation was evaluated on a two kilometer resolution. Consequently, within the Devils Lake Basin for this time period there were 2000 daily precipitation estimates provided over the entire geographic area of the basin.
4. Additional weather radar information that was non digitalized was obtained and included in the analysis for the time period 1977 through 1974. It was then manually digitalized to include in the study. The spatial distribution of this weather radar analysis was for 46 kilometer squares. Nonetheless, it still provided data that was useful for part of the analysis.
5. The data also included information from the weather observation locations that included temperature readings, and winds measurement. Osborne acknowledged that weather radar data from 1994 was missing 162 days of information. 1995 was missing 200 days of information. Therefore, Osborne further acknowledged that because of this the data is insufficient in providing meaningful annual summary as it relates to weather radar data for these years.
6. Records and data of cloud cover observations were used and considered from the Grand Forks Air Force Base located 35 miles east of the Devils Lake Basin. This data was recorded hourly since 1959.
7. Annual precipitation totals for Climate Region 3 of North Dakota which includes the Devils Lake Basin were also obtained for the time period 1895 through 2001.
8. Similar weather data to the extent available was obtained from other sources within a larger geographic areas include all of North Dakota, South Dakota, western Minnesota and southern Manitoba. Sources for this data included airports, weather balloon data, and weather satellites as well as weather radar data. This was to maintain integrity of the analysis.

- b. This data came from reliable sources including the Grand Forks Air force Base, the National Weather Service, the North Dakota Atmospheric Water Resource Board, the National Weather Service weather radar sites.
- c. To maintain the integrity of the physical framework in which the data and information was accumulated and considered, an area greater than the Devils Lake Basin was analyzed as described above. This was for the reasons now mentioned as well as the recognition that climatic changes come about from global events and are not so spatially limited.
- d. Data that was collected by the National Oceanic and Atmospheric Administration National Center for Environmental prediction was reduced to digital format by that agency before being processed and considered by defendants through their expert analysis.
- e. The weather radar estimation of precipitation was considered in the analysis and considered more accurate than the observation readings taken by the different national weather service sites. A study conducted in 1997 by the National Oceanic and Atmospheric Administration Office of Hydrology determined that weather radar under predicts gauge data by ten to twenty-five percent. That is, the error rate of weather radar is an under-prediction and not an over-prediction. So, by inclusion of weather radar as a tool to measure precipitation over the Devils Lake Basin over the time period in question would have resulted if anything in an under prediction or determination of radar rather than an over measurement.
- f. The use of cloud cover observation data from a location thirty-five miles east of the Devils Lake Basin was not inappropriate and was a scientifically reasonable source of data.
- g. The analysis also included a review of the number of instances of heavy storm events in the Devils Lake Basin over the time period in question.
- h. Osborne's analysis and explanation of the epoch time periods relating to the climate of the Devils Lake Basin, as addressed in subsequent findings.
- i. The significant increase in the water budget of the Devils lake basin over the more recent epoch periods and also in the last few years. As more fully addressed in subsequent findings, this includes the pattern of significantly more precipitation in the 1990's, including greater fall precipitation. The latter results in less opportunity for evaporation prior to spring thaws and rains and overall during the season. That in

turn has resulted in less available upper basin storage as borne out by other evidence and less chance of absorption by soils.

588. In reviewing the above data and the other weather information and records available to him, Osborne observed that because of the interaction between the different air circulation patterns previously described that these have taken on a different orientation. That has had impact on the long term orientation of the jet stream. The jet stream has shifted so that it now has a greater tendency to flow from the southwest to the northeast with low pressure systems from the gulf tracking along this path. As the storm systems collide with cold air masses more frequently over the Devils Lake Basin, the moist air rises causing the moisture to condense as precipitation. Over time this jet stream shift created more frequent storm and rainfall events in the Devils Lake Basin. By analysis of the other data described above over a significant time period it is this that serves as and supports Osborne's conclusion that there has been a climate shift and change. It is persuasive.

589. This dramatic climate shift occurred beginning in the 1970's and began to reveal itself in the 1980's. Osborne has noted this climatic shift has been identified in other peer literature. It was the shift in the orientation of the jet stream from a western or northern flow to a southwestern flow towards the northeast that brought with it more frequent storm systems with Gulf of Mexico moisture moving northward that created more frequent rainfall events over the Devils Lake Basin.

These more frequent rainfall and storm events resulted in an increase in the overall water budget of the Devils Lake Basin over this time period. It also brought with it more cloud cover.

By analyzing epoch changes the evidence supports Osborne's opinion that the 1990's brought with it an even more significant wet cycle within this greater climate shift. An epoch period in climatology is a 30 year period measured by beginning of decades. For example, an epoch period would include a time period of 1961 to 1990. The next epoch period would be 1971 to 2000. Figure 11 and Figure 12 of Defendant's Exhibit 3024 reflects the precipitation in inches for these epoch periods respectively for each month. Figure 13 contained on page 16 of Defendant's Exhibit 3024 then reflect the differences in the monthly precipitation distribution between the first climate epoch and the second climate epoch. Although summer precipitation increases there is also a dramatic increase in the autumn precipitation.

590. Within this new climatic change or cycle the 1990's experienced a shifting to a wet phase of that cycle. This is manifested by the following:

- a. As represented by Figure 3 there is an increased precipitation in North Dakota climate region 3 which includes the Devils-Lake Basin. In fact, 1990 through 2000 is the longest run of consistently above normal precipitation anomalies on record, based on Osborne's testimony. This by itself is insufficient, however, to suggest a wet phase and significantly greater precipitation that would impact Devils Lake and the water flowing into it. The entire water budget of the lake needs to be taken into account and that includes evaporation. Consequently, efforts to refute the conclusions of Osborne by the plaintiff's expert, Cecelio Olivier are not persuasive because he does not consider evaporation in his analysis. This court agrees that the complexity of the Devils Lake Basin relative to the climate factors precludes this simplistic comparison.
- b. The difference in monthly precipitation distribution from the climate epoch of 1961-1990 to 1971-2000 shows a dramatic increase, particularly in the autumn precipitation, but also an increase in the summer precipitation. (See Figure 12, Defendant's Exhibit 3024). The mean value of precipitation for the time period of 1900 through 2000 was charted and displayed with Figure 14 in Defendant's Exhibit 3024. Relative to that mean value the percentage deviation away from that has then been charted on Figure 14. That reflects a dramatic increase as a percentage of deviation away from the mean value of precipitation over that century.
- c. Applying a time period of 1931 through 2001 cool season precipitation (October through March) was charted for eastern North Dakota including the Devils Lake Basin. It shows the deviation from the mean cool season precipitation with a dramatic rise for the period of the 1990's. (See Figure 10 of Defendant's Exhibit 3024 at p.14). As noted by Osborne, this increase in cool season precipitation is more dramatic than at any other time during that past 70 year time period charted. *Id.*
- d. Data collected from the Grand Forks Air Force Base are observations of cloud cover revealed that there has been an increase in average annual cloud cover over the past 40 years.
- e. Analysis of the National Weather Service weather radar data reduced to annual summary of daily radar estimated precipitation reveals considerable variations within the basin as well as the presence of significant storm

1 events that leave a lasting trace to their existence. These storm events are  
2 capable of and have involved heavy rainfall amounts of in excess of 6 to 8  
3 inches per event. These are manifested by Figure 15 through Figure 21  
4 inclusive of Defendant's Exhibit 3024. This data and evaluation of it reveal  
5 that there has been excessive precipitation that has occurred that is well  
6 beyond the basin wide annual average of approximately 20 inches for any  
7 given year studied.

8 f. An analysis of the evaporation data for this same time period was also  
9 performed. The variability of this data is not as pronounced as the  
10 precipitation. This data analysis is reflected in Figure 22 through 32,  
11 inclusive. Evaporation data includes considerations of temperature and  
12 cloud cover. Cloud cover especially is significant because as a general rule  
13 with increased precipitation, particularly a longer period of precipitation will  
14 mean less evaporation. Further, cloud cover especially at night time will  
15 increase water vapor and keep temperatures cooler. What is significant is  
16 that the latter part of the 1990's and 2000 showed a reduction by as much as  
17 50% of the evaporation potential.

18 g. By considering all of the available data described above, the water budget  
19 from 1996 to 2000 inclusive was calculated by Osborne. (As previously  
20 noted, 1994 and 1995 lacked adequate radar data. So, only the latter half of  
21 the 1990's was calculated to determine a water budget). The water budget  
22 as explained by Osborne is the difference between annual precipitation as  
23 derived by radar estimation and the computed annual evaporation.

24 The results of this analysis for the Devils Lake Basin reveal increased  
25 excesses in the water budget for these years with the excesses generally  
26 increasing each year.

27 591. It was not the changes in precipitation by itself that created either the climatic change or the  
28 wet phase of the cycle that the Devils Lake Basin is currently experiencing. The entire water  
29 budget was determined by factors of cloud cover and temperature which in turn was used to  
30 calculate the contribution of evaporation to the water budget. All of this was considered in  
31 determining the water budget of 1996-2000 inclusive. Further, all this is consistent with the  
32 increased severe weather events of 1990-2000 which were explained. Even some of the  
33 plaintiffs acknowledged increased precipitation and storm events over this period.

34 The conclusions reached by Professor Osborne especially as it relates to the wet cycle is

1 partially manifested by actual inflows of water discharging into Devils Lake in the past  
2 decades as cited in Defendants' Exhibit 3171A at p.5:

3 *The estimated annual inflow to Devils Lake for 1950-1992 is 60,000 acre*  
4 *feet. The estimated average annual inflow for 1993-1999 is 328,000 acre*  
5 *feet, and inflow for this seven year period accounts for 47% of all inflow to*  
6 *Devils Lake for 1950-1999.*

7 592. During the time that these fifteen identified water projects were being developed and/or  
8 maintained from the 1970's the Devils Lake Basin region was experiencing a climatic change  
9 that was incapable of being measured until decades into it. Further, it took a period of time  
10 even within the climate change before it began to manifest itself. Osborne suggests this  
11 occurred in the 1980's.

12 In any event, Osborne testified it was also manifested by some variance in it. For example,  
13 drought commenced in the summer of 1987 and continued into the early 1990's.  
14 (Defendant's Exhibit 3171A). By February of 1993 the lake level had decreased over a  
15 period of several years to 1422.6 feet. The volume had decreased from 884,618 acre feet to  
16 570,339 acre feet.

17 As the water budget increased in the 1990's as previously explained, this in turn made more  
18 water available in the Devils Lake Basin for discharge towards and into the Devils Lake.

19 593. Based upon the previous findings and accepting the opinion of Professor Osborne as well as  
20 Gregg Wiche, this court finds that this climate shift is one that has not previously been  
21 observed in the modern recorded history of Devils Lake and had not been seen in previous  
22 years.

23 594. As recognized in previous findings the water elevation levels of Devils Lake have fluctuated  
24 significantly over recorded and prehistoric times. The parties dispute whether or not climate  
25 changes are a significant factor or cause for this. The plaintiffs assert that even with the  
26 testimony of Professor Osborne that any climate changes that he may have substantiated are  
27 insufficient to further conclude that these climate changes are the cause for the increased lake  
28 elevations experienced on Devils Lake. The defendants disagree and assert that not only are  
29 they the cause in fact for those increased elevations but that they serve as an act of God  
30 defense.

31 Having considered the evidence presented, this court finds there are sufficient facts in the  
32 record to reach a finding that this climate change and particularly the wet cycle of this new  
33 climatic shift or change is the reason that Devils Lake and the Devils Lake Basin are  
34 experiencing the high volumes of water discharging into Devils Lake and adding water to the  
wetlands and depressions in the upper basin. This wet cycle as described above has had an

1 adverse hydrologic impact on Devils Lake and the water elevations of it, as well as on the  
2 entire Devils Lake Basin. This is based upon the following:

- 3 a. As previously found by this court, a climate change has occurred that has  
4 brought in significantly more low pressure systems from the Gulf of Mexico  
5 into the Devils Lake Basin. This change began in the 1970's and manifesting  
6 itself in the 1980's. This has been highlighted by a wet phase of this new  
7 climatic cycle beginning in the 1990's.
- 8 b. Although Professor Osborne acknowledged that he was not offering an  
9 opinion as to what happened to the precipitation once it hit the ground, his  
10 testimony or opinion is not necessary to reach a determination. His opinion  
11 and this court's finding that the atmospheric water budget has substantially  
12 increased means that this increased quantity of water available in the basin's  
13 water budget must be disbursed either through accumulation in wetlands,  
14 depressions, potholes or lakes of the upper basin, through absorption into the  
15 soil, by transpiration, or by evaporation. To the extent it does not it must  
16 naturally find itself in Devils Lake. If the water budget is greater, it logically  
17 means more water will likely reach Devils Lake.
- 18 c. Particularly in terms of the wet cycle of this new climate shift, Plaintiffs' own  
19 Exhibit 463 helps substantiate the increase in precipitation, a major  
20 component of the overall water budget. On page 16 of that exhibit Table 2-4  
21 sets forth an annual precipitation chart for the years 1979 through 2000  
22 inclusive. For that entire period the average rainfall was 18.04 inches. Since  
23 the time that the wet cycle manifested itself in 1993, the average for those  
24 years of 1993 through 2000 showed 20.85 inches per year, almost 21 inches.  
25 If you were to separate out the wet phase years from the prior years, the  
26 change in precipitation as reflected in annual averages is even more dramatic.  
27 For the years 1979 through 1992 inclusive the average was 16.4 inches  
28 annually. This means that once the Devils Lake Basin entered the wet cycle,  
29 annual precipitation increased on the average by almost four and one-half  
30 inches.
- 31 d. As explained by Professor Osborne and discussed in other findings the  
32 evaporation potential, another major component of the water budget, has been  
33 significantly reduced during the wet cycle of this climate change.
- 34 e. From all the evidence submitted this court agrees with the opinion of Gregg

1 Wiche as set out in Plaintiffs' Exhibit 337. After being offered by them,  
2 Plaintiffs' Exhibit 337 was received into evidence. As stated by its author  
3 Gregg J. Wiche, in Exhibit 337:

4 *In general, the water levels of Devils Lake fluctuate in response to climate*  
5 *variability, but the hydrologic characteristics of the Devils Lake Basin*  
6 *distort the hydrologic response. . . .*

7 *Based on the review of investigations conducted on terminal lakes in*  
8 *North America and other areas of the world, a number of observations*  
9 *can be made. In general, the extremes in water levels of terminal lakes in*  
10 *western North America fluctuate primarily in response to climatic*  
11 *variability.*

- 12 f. There is not just more water in Devils Lake. There is more water in the entire  
13 part of the basin that drains into Devils lake. Satellite imagery supports the  
14 determination that this increased precipitation and decreased evaporation  
15 resulted in increased water storage in the upper Devils Lake Basin thereby  
16 depriving the region of water storage which in turn would naturally result in  
17 more water flowing into Devils Lake. The Defendant's Exhibit Number 2252  
18 is a LandSat photo taken in 1992. Defendant's Exhibit Number 2253 is a  
19 LandSat photo taken in 1997. These two exhibits are photos of the  
20 geographical area of the Devils Lake Basin taken in July or August of those  
21 years. As stated in Defendant's Exhibit 3171A, ". . . During 1992-97 the  
22 area of land inundated by water in the upper basin increased 109,310 acres  
23 (256%) and the area of Devils Lake increased 56,659 acre (129%). By 1997  
24 more than 10% of the entire basin area was water." Exhibit 3171A p.6. This  
25 statement does not indicate the volume or acre feet of additional water storage  
26 in the upper basin, but there would obviously be some amount. Otherwise  
27 there would be no additional acres of land inundated by water. All of this is  
28 compelling evidence that as the years in the 1990's passed, less and less  
29 storage was available in the Devils Lake Basin. So, it naturally means that the  
30 surplus surface waters had to seek their way to Devils Lake.

31 That trend of storage in the upper basin has been at least maintained since  
32 1997. Defendant's Exhibit 2254 is an exhibit that this court received into  
33 evidence but limited its application. In reviewing that section of testimony,  
34 this court concludes that it erroneously limited it to the extent that it did and in  
light of the offer of proof made. Although the court's intent was to preclude  
its use as indicating a volume of water represented by its imaging, it was

1 appropriate to consider it for the purpose to show similar or additional acres of  
2 an undetermined amount beyond 1997 and up to 2005.<sup>4</sup> A visual review by  
3 any lay witness could reach that conclusion. Consequently, this court will  
4 accept Defendants' Exhibit 2254 for the limited purpose set out in the offer of  
5 proof of establishing factually that even since 1997 water storage has been at  
6 least maintained and may have likely increased to some extent in the upper  
7 basin of the Devils Lake Basin.

8 However, this court also must acknowledge and it is its opinion that is not  
9 reasonably possible to quantify an increase by even some general description.  
10 First, the exhibits when compared do not cover the same area. The Hurricane  
11 Lake area is noticeably absent on Defendants' Exhibit 2253 and Exhibit 2252  
12 but present on Defendants' Exhibit 2254. Second, Exhibit 2254 is almost  
13 three times larger than the other two photo exhibits. So, caution must be taken  
14 in making any comparison to the smaller photos. Last, the only increased  
15 storage reasonably detectible by the court was in the area of the chain of lakes.  
16 And, that was only slightly discernable. Additionally, increased wetland  
17 storage was not detectible in the upper basin, at least as compared to the very  
18 noticeable changes between 1992 and 1997.

- 19 g. Although the plaintiffs have offered Plaintiffs' Exhibit 1001 to refute the  
20 assertion that the increased precipitation that has occurred during the 1990's  
21 over the Devils Lake Basin is responsible for the increased lake levels of  
22 Devils Lake, this court is not persuaded by the exhibit or testimony by  
23 plaintiff's expert in support of it. As cited by the defendants, Mr. Olivier is  
24 not a climatologist or meteorologist. In evaluating the response of Olivier and  
25 his use of Plaintiffs' Exhibit 1000 and 1001, the education and experience of  
26 Professor Osborne was more persuasive.

27 Mr. Olivier has attempted to use only precipitation figures to directly relate to  
28 elevation levels of Devils Lake. Instead, he needs to consider the actual water  
29 budget. This takes into account not only precipitation, but also evaporation.  
30 Olivier did not do this. He attempted to combine the data contained in Figure  
31 2 and Figure 3 of Defendant's Exhibit 3024 to refute the defendant's assertion  
32 of the impact of the increased water budget of the 1990's. Olivier cites that  
33 from 1896 to 1906 Devils Lake Basin received a total of 229.13 inches of rain  
34 with eight consecutive years of above average precipitation. Further, he notes

1 that the elevation of Devils Lake did not rise at all during that eleven year  
2 period and remained at approximately 1425 feet. He then compares the period  
3 of 1991 through 2001 to show a similar pattern of rainfall, 232.66 inches. The  
4 difference, the Olivier notes, is that the lake rose approximately 22 feet,  
5 adding approximately 1.8 million acre feet of water.

6 In offering this evidence this court agrees with the defendants that the  
7 plaintiffs failed to take into account the evaporation that was experienced over  
8 the time period and include that in the comparison. Without doing that you  
9 cannot conclude or presume what amount of water is in the water budget due  
10 also to the atmospheric processes. As cited by Osborne, on the average  
11 evaporation was 34 inches annually. In 1976 and 1988 studies determined 40  
12 and 45 inches respectively. Further, as noted by Osborne the climatic  
13 conditions existing prior to the compared period will influence the water  
14 budget. Last, there is no evidence to compare the availability of upper basin  
15 storage for the years of Olivier's comparison.

16 Based on this, I find that the Plaintiffs' Exhibit 1001 is not persuasive to refute  
17 Osborne's opinions and the court's reliance on them. Likewise, Plaintiff's  
18 Exhibit 1000 is not evidence of a persuasive nature.

19 Therefore, based upon all of the above and previous findings, this court is satisfied that the  
20 climatic change and wet phase for the water budget within that change that was experienced  
21 by the Devils Lake Basin in the 1990's was a significant factor in the increased water levels  
22 experienced on Devils Lake. This determination impacts issues relating to causation, an  
23 element required in establishing inverse condemnation liability.

24 595. As a basis for their opinion that the different 15 named water projects brought additional  
25 quantities of water into Devils Lake that would not have otherwise entered it, the plaintiffs  
26 have relied substantially on a study prepared by West Consultants, Inc. of San Diego,  
27 California for its modeling and calculations. Consequently, it is appropriate to evaluate that  
28 study and outline how it was developed and how it was structured. Hereafter it is referred to  
29 as the West Report or West Study. The West Report was prepared for the United States  
30 Army Corps of Engineers by West Consultants Inc. The study was completed on April 30,  
31 2001. It is Plaintiffs' Exhibit 463. It is voluminous and detailed with a number of  
32 appendixes and attachments substantiating how it was developed and how its results were  
33 obtained.

34 The purpose of the study was stated as follows:

*The primary purpose of this study is to assess the impacts of upper basin*

1 *storage restoration alternatives on the inflows to Devils lake. The upper*  
2 *basin storage alternative under consideration is the restoration of "drained"*  
3 *depressions.*

4 In other words, its goal was to identify certain depressions and potholes within the entire  
5 Devils Lake Basin and based upon random future climate sequences determine what  
6 additional water storage was available if those depressions and potholes were restored. The  
7 study was intended to answer the question of whether upper basin depressions and potholes  
8 had a functional storage ability.

9 596. In preparing the model ultimately identified as PRINET for Pothole-River Networked  
10 Watershed Model there was significant data collection and evaluation. This included the  
11 following:

12 a. Data was collected relating to the elevation of the different areas of the  
13 Devils Lake Basin. Data was collected regarding wetlands inventory and for  
14 soil types. Data was collected for precipitation and snow melt. Finally,  
15 there was data collected regarding evaporation for Devils Lake.

16 b. From the use of arial photos, national wetlands inventory data, flow  
17 direction data, and digital quad maps, depressions were delineated and  
18 classified for the entire upper basin watershed. There were four categories  
19 of depressions: possibly intact, possibly drained, lake, or other.

20 c. Once the depressions and potholes were identified or delineated and  
21 classified, only those categorized as possibly intact or possibly drained were  
22 included in the analysis. Lakes, including the lakes shown on the USGS  
23 digital quadrangle maps and such things as drainage ways, overlapping  
24 highways and houses were not considered.

25 It is important to recognize that the West Report did not seek to verify the  
26 accuracy of the methodology used by it to identify depressions and potholes.  
27 That is, once identified no effort was made to randomly go out into the field  
28 and determine the accuracy of the classification.

29 d. From the analysis performed it was estimated that there were a total of  
30 115,668 depressions or potholes either possibly intact or possibly drained in  
31 the upper basin. Of this, 52,210 were possibly drained and they were  
32 determined to have a volume of 132,729 acre feet. (It should be noted that  
33 excluded from this was the Devils Lake north slope and south slope sub-  
34 basins which drained directly into Devils Lake). The total acres of both  
possibly drained and possibly intact depressions or potholes were 294,419  
acres.

e. In comparison to other studies which estimated available depressions to  
store water, the West Report's analysis was in the range of previous studies.  
A summary of those depression area estimates from different studies is  
located on page 32 of the report and lists the following:

|  |               |
|--|---------------|
| North Dakota State Water Commission (done 798-599) | 218,000 acres |
| US Bureau of Reclamation (done 299)                | 65,250 acres  |

(possibly drained only)

West Consultants (done 4-2001)

294,419 acres

USFWS (done 1-97)

370,000 acres

Ludden, Frink, and Johnson (done 1-83)

412,000 acres

Footnotes in the Table 3-6 note that the areas evaluated were not necessarily comparable for reasons noted in the footnotes.

This data and assessments that were made in terms of available depressions or potholes for possible upper basin storage were then applied towards a watershed model. The West Study attempted to identify for potential storage capacity depressions and potholes and not wetlands.

597. In order to accomplish the purpose of its study, the West Consultants concluded that a new model needed to be developed to make this assessment. Their hydrologic model was entitled Pothole-River Networked Watershed Model or PRINET. It utilized topographic and climatic information to simulate a long term process of rainfall, evaporation, and water storage for a terrain with a substantial number of depressions or potholes. As noted in the report, the model was specifically developed to simulate soil storage, depression storage, and runoff in the Devils Lake Basin. (West Report at p.39).

Although there are six sub-watersheds encompassing the upper basin of Devils Lake, each sub-watershed was divided into numerous additional sub-basins. The model performed ten computations on a daily basis. They were:

1. To determine precipitation and evaporation for each day.
2. Add precipitation to the soil moisture and to the depressions.
3. To determine infiltration of precipitation into the soil and update soil moisture level accordingly.
4. Any precipitation not infiltrating was to run off into intact depression storage. A separate accounting was made of on river depressions and off river depressions.
5. Where upstream watersheds existed they were modeled as sources of flow into the downstream sub-watershed model at the appropriate location.
6. Evaporation was calculated for each sub-basin's intact depressions and the water storage volume reduced accordingly.
7. Evapo-transpiration was calculated for each sub-basin soil, and the moisture level reduced accordingly.
8. Percolation was determined for sub-basins where the soil was sufficiently saturated to permit percolation.
9. When the depression water volume of a sub-basin's off river depression

1 storage exceeded off river depression storage capacity, the excess was  
2 directed to run off into the on river intact depression storage of the same  
3 sub-basin.

- 4 10. When depression water volume of a sub-basin's on river depressions  
5 exceeded depression storage capacity, the water was modeled to flow into  
6 the intact on-river depression storage of the next downstream sub-basin or to  
7 the outlet of the sub-water watershed if there were no downstream sub-  
8 basins.

9 So, the method in the modeling and factors considered in its construction were detailed and  
10 took into account a number of variables.

11 Further, the model was then calibrated through a process that took into account stream flow  
12 and precipitation gauges. This calibration included calibration of the individual sub-  
13 watersheds. The years in which calibration was done were 1985 through 1999.

- 14 598. Because the primary purpose of the study was to assess the impact of upper basin storage  
15 restoration alternatives on the inflows to Devils Lake, West Consultants developed 10  
16 climatic scenarios encompassing 20 year climate sequences to simulate future conditions with  
17 and without depression restoration. In doing this task, possibly drained depressions having  
18 an average depth of greater than or equal to one-half foot were candidates for restoration. It  
19 was noted by Raymond Walton who was a member of and participated in the development of  
20 the West Report that the vast majority of the depressions were one to two feet in depth. This  
21 is supported by Table 6-3 page 65, Plaintiffs' Exhibit 463.

22 There were 12,464 possibly drained depressions that were restoration candidates. They were  
23 calculated by West to have a storage capacity of 127,835 acre feet. The study's goal was to  
24 shift these from possibly drained to possibly intact. This represented 96% of the total volume  
25 of all identified possibly drained depressions or potholes.

26 As noted in the report and testified to by Raymond Walton, the climatic conditions and  
27 sequences were randomly selected for the 10 scenarios.

- 28 599. Through the calculations of the PRINET model the West Report set forth the results on Table  
29 6-10 at page 72 of the report. Applying the 10 climate sequences against a 100% restoration  
30 level the average annual runoff reduction in acre feet was projected to be 23,841 acre feet.  
31 Applied against 100% restoration storage level of 127,835 acre feet, this resulted in a  
32 rounded percentage of 19% water volume that could be stored in the identified depressions  
33 and potholes and restored in the upper basin. This rounded figure was based upon dividing  
34 23,841 acre feet of average annual runoff reduction by 127,835 acre feet of potentially

1 restored storage. This figure is .186498 or rounded to .1865. This is the same factor or co-  
2 efficient which the plaintiffs through their expert witness, Cecelio Olivier, used in the  
3 calculations resulting in the opinions of their expert.

4 600. A number of expert opinions were presented into evidence on behalf of the plaintiffs through  
5 the testimony of Cecelio Olivier and his consulting firm, EOR.<sup>8</sup> Mr. Olivier has broad  
6 educational and employment experience in hydrology. He received a bachelor of science  
7 degree in mining and industrial engineering from the Polytechnic University, Madrid, Spain,  
8 in 1986. Following that, he received a master of science degree in civil and in environmental  
9 engineering from the University of Minnesota in 1990.

10 Upon completing his education, Olivier became employed as an engineer with a twin cities  
11 engineering consulting firm, working in numerous water resource projects and studies. For  
12 the last ten years from the time of trial, he has been a member of his own consulting company  
13 called Emmons-Olivier Resources, or EOR. This firm specializes in dealing with hydrology  
14 and hydraulics issues relating to water resources and water resources management. Through  
15 that business, Olivier has been involved in a number of water resource studies and projects.

16 Olivier is a member of a number of professional societies and is licensed as a professional  
17 engineer in the states of Minnesota and Wisconsin, as well as in Europe. He has published  
18 some articles, although none since 1994.

19 601. In making its findings this court considered the testimony and opinion of Doctor Raymond  
20 Walton, a witness presented by the defendants. Doctor Walton has significant and broad  
21 education and employment experience in the field of hydrology, hydraulics and water  
22 resources management. He is currently a vice president with West Consultants and manages  
23 their Bellevue, Washington office.

24 Doctor Walton received his bachelor of science degree from University College in London in  
25 the United Kingdom in the field of mathematics. He then received his master of science  
26 degree in engineering hydrology from the University of New Castle in the United Kingdom.  
27 He received his PhD in hydraulics from the University of Florida in 1978. For one year he  
28 was a visiting professor at North Carolina State University, teaching on topics of statics,  
29 dynamics, hydraulics, and water resources.

30 Doctor Walton is a licensed professional engineer in several states. He is a member of the  
31 American Society of Civil Engineers (ASCE), he is a diplomat of the American Academy of

32 <sup>8</sup> Although the expert opinions offered by the plaintiffs were generated by  
33 work done by EOR, that work was managed and overseen by Cecelio Olivier. He  
34 testified at trial. No written report prepared by EOR was offered and  
received into evidence at the trial. Therefore, the plaintiffs' opinions  
throughout this decision are credited to Mr. Olivier.

1 Water Resources Engineer, a member of the Washington Hydrologic Society, Oceanography  
2 Society, and of the Society of American Military Engineers. Doctor Walton has been  
3 involved with various committees or subcommittees within ASCE and until recently was the  
4 chair of the technical committee on monitoring wetland hydrology. He was a member of that  
5 committee for approximately six years. Doctor Walton has been employed with West  
6 Consultants for a number of years. Prior to that he was employed for approximately fifteen  
7 years with other nationwide engineering consulting firms. He is currently the senior person at  
8 the West Consultants office in Bellevue, Washington and a vice-president of the company. In  
9 addition to managing that office he also has been involved in a number of consulting projects,  
10 including those involving hydrology and wetlands. He has written over fifty professional  
11 papers in the field of hydraulics, environmental engineering, ground water and surface water  
12 hydrology. Many of these are listed in over five pages of attachments to his resume which is  
13 Defendants' Exhibit 4080.

14 602. West Consultants which is a nationwide engineering consulting firm and has approximately  
15 twenty-five engineers within its employment, was retained by the United States Army Corps  
16 of Engineers to conduct a study relating to the Devils Lake Basin. As a result of that the  
17 West Report, Plaintiffs' Exhibit 463, was completed.

18 Initially, Doctor Walton was involved in the water balancing model for the lake system  
19 within the study. However, that was assumed later and transferred back to the United States  
20 Geological Survey. Thereafter, Doctor Walton's task within the West Study was to serve as  
21 the quality assurance and quality control manager. That included the responsibility of  
22 reviewing the study at the report level. He also had the responsibility to serve as a consultant  
23 to the San Diego project team on wetland hydrology and wetland hydrologic processes as the  
24 study proceeded forward. His work included reviewing some of the drafts of the study.

25 603. The plaintiffs' expert, Cecelio Olivier, opined that a substantial volume of water discharged  
26 into Devils Lake over a period of several years that would not have otherwise done so but for  
27 the conduct of the defendants as it related to the fifteen identified water projects. There are  
28 essentially three categories of opinions. One category of opinion asserted by the plaintiffs  
29 through its expert, Cecelio Olivier, opines that certain volumes of water from drained or  
30 possibly drained wetlands have discharged into Devils Lake between 1985 and 2002 which  
31 would not have otherwise done so but for the facilitation of that discharge allegedly created  
32 by the fifteen identified water projects. These waters the plaintiffs claim discharged into  
33 Devils Lake are alleged to be from the possibly drained depressions and potholes in the upper  
34 basin identified by the West Report or alternatively from the USFWS. The second category

of opinions presented by the plaintiffs is that the defendants are responsible for waters that plaintiffs claim have discharged into Devils Lake that would not have otherwise done so because of the lost storage allegedly created in six of the fifteen named water projects. The third category includes opinions that identified channel improvements by themselves or in combination with the work done on outlet structures caused a significant volume of water to discharge into Devils Lake that would not have but for the projects. These opinions have been addressed in prior opinions and will be further analyzed in detail in the subsequent findings.

604. In reaching their opinions the plaintiffs and their experts relied on two computer water models to support their opinions. The plaintiffs relied substantially on the PRINET model and certain conclusions hereafter identified in it to reach a number of their calculations relating to the volume or acre feet of water discharging into Devils Lake from the various projects and/or wetland storage. The plaintiffs and their experts used another model called the WATBUD to do additional calculations in support of their opinions.

The function of the WATBUD model was to take input of waters discharging into Devils Lake as calculated by the PRINET model and to then add precipitation figures to the lake directly as well as runoff figures from the immediate drainage area and to also take into account evaporation from the lake. With input of data the WATBUD model was used to calculate the difference in terms of what would be the impact on Devils Lake if wetlands or lake bodies were not drained as claimed. The impact was measured in terms of elevation change and volume change.

605. The plaintiffs' expert, Cecelio Olivier, opines that the defendants are responsible for the discharge of waters into Devils Lake from "wetland" drainage in the upper basin. Specifically, Olivier opines that the fifteen identified water projects or at least some of them, enhanced or facilitated the flow of waters draining from wetlands in the upper basin thereby causing a portion of these waters to discharge into Devils Lake. His opinion is that the volume of water discharging into Devils Lake between 1985 to 2002 from possibly drained depressions or potholes is at least 391,384 acre feet and up to 734,162 acre feet. Olivier opines that 50% to 75% of these water volumes would have never reached the Devils Lake Basin but for the government projects. Olivier's further opinion is that in applying these calculations to the WATBUD model, at the end of the year 2002 the lake would have been lowered by at least 2.25 feet to 4.88 feet if these waters had not discharged into Devils Lake. For reasons set forth below, this court finds this opinion is unreliable. Plaintiffs have failed to substantiate this opinion by the burden of proof required:

1 a. To reach this opinion both for the high and low range of the volume of water  
2 allegedly discharging into Devils Lake, plaintiffs relied upon two studies for  
3 data to input into their methodology for reaching these calculations.  
4 Plaintiffs relied upon the West Report for its lower calculations. The West  
5 Report determined that there were 132,729 possibly drained acre feet of  
6 depressions or potholes in the upper basin. (Excluding the Stump Lake sub-  
7 basin). It randomly selected 96% of those depressions and potholes to apply  
8 towards its own calculations in determining restoration capacity of those  
9 depressions and potholes. That resulted in 127,835 acre feet of possibly  
10 drained depressions or potholes available for restoration and water storage.  
11 The methodology selected by the West Consultants in identifying these  
12 possibly drained depressions and potholes are well laid out in its study,  
13 Plaintiffs' Exhibit 463, and described in previous findings. That process  
14 was generally reliable for the purpose intended for the West Study.

15 b. The higher range of the opinion, 734,162 acre feet of water discharging into  
16 Devils Lake between 1985 and 2002, is based upon a U.S. Fish and Wildlife  
17 Service study that concluded that there were 189,000 acres of possibly  
18 drained depressions or potholes in the entire Devils Lake Basin including  
19 Stump Lake. It should be noted that the calculation was 189,000 acres and  
20 not acre feet. Although in referring to the fish and wildlife study, Olivier  
21 cites Plaintiffs' Exhibit 338, that USFWS figure of 189,000 acres is not  
22 located in that exhibit and there is no explanation in the evidence received of  
23 how it was formulated by the U.S. Fish and Wildlife Service except as  
24 offered by defendants. The only source for that figure is on page 32 of  
25 Plaintiffs' Exhibit 463.

26 It is only through the testimony of Dale Frink that some explanation is  
27 offered of how the U.S. Fish and Wildlife Service determined those possibly  
28 drained wetlands. As described by Mr. Frink, the U.S. Fish and Wildlife  
29 Service used a "simplistic approach" to reaching this calculation. The  
30 USFWS asked the Natural Resource Conservation Service for an estimate of  
31 hydric soils in the Devils Lake Basin. They were given a number of 400,000  
32 acres. The U.S. Fish and Wildlife Service then estimated that at that time of  
33 the evaluation there were 211,000 acres of intact wetlands in the Devils  
34 Lake Basin. Consequently, they simply subtracted 211,000 from 400,000 to

1 reach 189,000 acres of possibly drained wetlands. There was no  
2 determination made by the U.S. Fish and Wildlife Service, at least from any  
3 evidence presented, that a detailed method was incorporated in their study to  
4 delineate and identify what wetlands were drained and what wetlands were  
5 not drained in the Devils Lake Basin. Based on the methodology used to  
6 determine the USFWS wetland acres, this court is not inclined to find that  
7 study or those figures persuasive or reliable in accurately estimating the  
8 acres of possibly drained wetlands in the upper basin. So, this adversely  
9 impacts and casts doubt on the ability to rely on Olivier's opinion..

10 c. In using that figure of 189,000 acres to calculate the volume of water  
11 discharging into Devils Lake for the high range, there is no explanation  
12 offered by the Olivier or any other witness how 189,000 acres were  
13 converted into any volume or acre- feet of water. All of the previous  
14 calculations made by both the plaintiffs as well as the defendants have dealt  
15 with volume in terms of acre feet in any formulas or calculations made. Yet,  
16 an acre feet figure relating to the U.S. Fish and Wildlife Study is absent from  
17 the evidence in this case. Consequently, this court cannot determine how  
18 the 189,000 acres figure was used by the plaintiffs in any formula or  
19 calculation to reach the results, 734,162 acre feet. So, this adversely impacts  
20 and casts doubt on the ability to rely on Olivier's opinion.

21 d. In reaching the opinion that 50% to 75% of these water volumes discharged  
22 into Devils Lake only because of the government projects, neither for the  
23 low range or high range of the plaintiffs' opinion, no formula or other  
24 explanation was set out in the record either by testimony or exhibit to  
25 explain how these percentages were determined. It is clear that the input  
26 data included for the low range a time period of 1985 to 2002. It included  
27 lost storage capacity of either 127,835 acre feet or alternatively 132,729 acre  
28 feet. But, even the lack of this disclosure makes it unclear specifically what  
29 volume might have been used in the plaintiff's low calculations. For the  
30 high range calculations it is also evident that the time period 1985 through  
31 2002 was used. Other than that and knowing that 189,000 acres was  
32 somehow worked into the calculation, it is not clear beyond that what else  
33 was used to make these calculations and then reach the opinion that the  
34 projects contributed 50% to 75% of 734,162 acre feet to Devils Lake. This

adversely impacts and casts doubt on the reliability of Olivier's opinion.

e. As for the high range calculation, Olivier's opinion is flawed because it appears to use drained depressions not only in the sub-basins draining into Devils Lake, but for the entire Devils Lake Basin and that would include Stump Lake sub-basin. (See Plaintiffs' Exhibit 32 West Report, footnote 4 and testimony of Cecelio Olivier). This adversely impacts the reliability of this opinion.

f. In reaching his opinions, Olivier makes radical evidentiary presumptions. Particularly the West Report, but apparently the U.S. Fish and Wildlife Study also determined through a delineation process there were possibly drained depressions and potholes in the upper basin that if restored were capable of some volume of water storage capacity. There is no evidence in the record to indicate that these studies stand for the proposition that volumes of water equivalent to the storage capacity of these depressions or potholes or some portion of them were actually present in the upper basin and/or actually drained into the water channels of the upper basin and/or also then actually discharged either fully or by some portion into Devils Lake during the years of the analysis. These are significant presumptions made by the plaintiffs that are not reasonably supported by the evidence. In fact, Doctor Walton specifically stated that the West Study was designed to forecast water retention capacity for a future given climate sequence. It was not to calculate what water volume was present but not retained in the past, especially when using randomly selected climate sequences. The plaintiffs cannot presume the storage capacity of these depressions and potholes equate to drained water equivalent to that capacity or some portion of it. These presumptions significantly impact and cast doubt on the reliability of Olivier's opinion.

g. Although Olivier testified that he ran the PRINET model to reach these calculations relating to the acre of feet based upon the identified depressions and potholes from the West Study as well as the U.S. Fish and Wildlife Study, his testimony and the evidence is not clear on whether in fact he used the .1865 West co-efficient or used another co-efficient. If in fact he used another co-efficient to reach his calculations that has not been disclosed. In any event Olivier has offered no calculations or a formula (such as he did for

1 the lost storage opinions) to explain how he reached his results.

2 There is some indication that at least for the West Report acres of identified  
3 depressions and potholes, that the West Study co-efficient of .1865 was used  
4 and possibly the same for the U.S. Fish and Wildlife depressional impacts.  
5 But it is not clear. After testifying extensively regarding a number of outlet  
6 structures for the various lakes in the chain of lakes and offering opinions  
7 about water discharged into Devils Lake because of lost storage capacity and  
8 using the formula  $V = S + .1865 \times S \times Y$ , the following exchange occurred  
9 during direct examination:

10 *Q: Now Mr. Olivier, did you . . . did you go through the same process in*  
11 *quantifying the impact from the PRINET numbers that you discussed*  
12 *before the break as to their impact on Devils Lake?*

13 *A: Yes I did.*

14 *Q: Okay. And as far as the . . . you ran one version of PRINET with the*  
15 *West depressional effects and one version of PRINET with the U.S.*  
16 *Fish and Wildlife depressional impacts?*

17 *A: Correct.*

18 . . .

19 *Q: And Mr. Olivier, did you calculate the total for your two runs of the*  
20 *PRINET model, one using the West numbers and one using the U.S.*  
21 *Fish and Wildlife numbers as to the acre feet of impact?*

22 *A: Yes I did.*

23 Trial Transcript Vol. 7, p.1459. In addition, in response to a question he  
24 states EOR used that number (.1865) to "*calculate these impacts*". T.T.  
25 Vol. 8, p.1791, 1.6-13.

26 If in fact Olivier ran the West model in some modified fashion and  
27 ultimately used a different co-efficient or a different formula to calculate lost  
28 storage, it is not clear and the calculations and methodology Olivier used in  
29 reaching the results are not evident in the record. This adversely impacts the  
30 opinion's reliability.

- 31 h. It is not disclosed what kind of climate sequences were used as part of any  
32 model run. As previously noted, the West Report used randomly selected  
33 climatic sequences to calculate future potential storage capacity in the upper  
34 basin from identified possibly drained depressions or potholes. Imbedded in

1 the .1865 coefficient factor were random climate sequences for several years  
2 that had no historical consistency with the climatic conditions actually  
3 experienced in sequence from 1985 to 2002, inclusive. So, if Olivier's  
4 calculations and the methodology used by him included the same climate  
5 sequences without adjustment, that also creates a flaw in the calculations. It  
6 would adversely impact the reliability of the opinion.

7 i. As noted by the defendants, there is no evidence that has been presented as  
8 to when these identified depressions or potholes were drained or if they were  
9 actually drained. Even Mr. Olivier seems to recognize this. At Volume 8,  
10 p.1793, lines 19-20 he conditions his opinion on, "*. . . if wetlands would*  
11 *have been drained*". Further, there is no evidence to determine if any of  
12 these depressions or potholes during the time in question could have been  
13 physically and/or legally restored. This adversely impacts the reliability of  
14 Olivier's opinion.

15 j. Even if the possibly drained depressions or potholes actually brought water  
16 into the drainage system of the upper basin during the studied time period, it  
17 still begs the question of how much actually entered into the drainage  
18 system. Further, defendants raise a valid point that once any water entered  
19 the upper basin the drainage system there is a reasonable likelihood that the  
20 plaintiffs are double counting the water volume they claim has discharged  
21 into Devils Lake because of the six outlet control structure projects that  
22 would not have otherwise done so. This is because all of this alleged water  
23 draining from privately drained depressions or potholes would have then had  
24 to enter one of the various lakes in the chain of lakes and go through the  
25 drainage system either through Big Coulee or Channel A. To the extent it  
26 could have found itself available for storage in one of the upper basin lakes,  
27 but kept flowing downstream towards Devils Lake because one of these  
28 projects had eliminated that storage capacity, the plaintiffs would be double  
29 counting. Because the formula and methodology used by Olivier is unclear,  
30 this cannot be readily determined. However, it is a legitimate concern the  
31 defendants have raised and creates sufficient evidentiary doubts on the  
32 opinion and contributes to its lack of reliability. In fact, Mr. Olivier admits  
33 that at least some of the water impact he calculated for lost storage discharge  
34 would be some of the same water allegedly causing impact from the

1 wetlands opinion. [(See Finding 621(e)]. This adversely impacts and casts  
2 doubt on Olivier's opinion.

- 3 k. All of the parties (including the plaintiffs) agree that the defendants are not  
4 responsible for the private drainage of any depressions or potholes in the  
5 upper basin. In addition, there is no evidence that any of the party  
6 defendants were involved in any of private drainage. So, without providing  
7 evidence sufficient to answer questions cited in sub-part (f), references to the  
8 storage capacity estimated from either the West Study or from the USFWS  
9 study is irrelevant. It is not the fault of any of the defendants that any  
10 volume of this water entered the upper basin drainage system from these  
11 depressions or potholes. It still requires the ability to answer the questions  
12 posed in sub-part-(f). Otherwise, it is impossible to scrutinize let alone  
13 accept plaintiffs' theory and opinion. This adversely impacts and casts  
14 doubt on Olivier's opinion.

15 Based upon all of the above in their totality but also separately, this court is of the  
16 determination that Mr. Olivier's opinion is not supported by reliable information and data, or  
17 by sufficient explanation to support it. It is not persuasive or reliable. Further, to reach the  
18 opinion offered by plaintiffs requires significant speculation. Therefore, as to this opinion  
19 the plaintiffs have failed to meet their burden of proof.

20 For all of the reasons set out above, Olivier's opinion that 50% to 75% of the water from  
21 "wetland" drainage would not have reached Devils Lake but for the projects identified in the  
22 plaintiffs' complaint is also unreliable and has not been proved.

23 606. It was the opinion of the plaintiffs through their expert, Cecelio Olivier, that as a result of  
24 certain projects previously identified and evaluated in previous findings, lost storage occurred  
25 in certain upper basin lakes resulting in the volumes of water set out below discharging into  
26 Devils Lake that would not have otherwise done so. The opinion of the plaintiffs as  
27 previously noted but recited here again are as follows:

28 Hurricane Lake – discharge of 12,200 to 25,877 acre feet

29 Lake Alice – discharge of 8,198 acre feet

30 Lake Irvine – discharge of 72,671 acre feet

31 Sweetwater/Morrison Lakes – discharge of 34,876 to 71,336 acre feet

32 Dry Lake – discharge of 116,980 acre feet

33 Lake Ibsen – discharge of 9,437 acre feet

34 Plaintiff acknowledged that the .1865 factor was applied in making these calculations.

1 607. The parties have disputed the impact of a formula used by Mr. Olivier to calibrate volume  
2 impact of certain projects. The formula used by Olivier in reaching the above calculations in  
3 the previous finding was:  $V \text{ (delivered)} = S \text{ (reduction)} + 0.1865 \times S \text{ (reduction)} \times Y$ . Insofar  
4 as the claims for lost storage in the upper basin lakes is concerned, the formula was based  
5 upon the following: V is the alleged cumulative impact to Devils Lake for the life span of the  
6 project based upon the plaintiffs' contention the outlet elevations of the particular lakes were  
7 lowered. Factor S in the equation is the plaintiffs' calculated first time loss of the asserted  
8 lowering of the outlet elevation for the particular lake. The .1865 factor was derived directly  
9 from the West Report, Plaintiffs' Exhibit 463, as testified to by Olivier and acknowledged in  
10 Plaintiffs' Brief. Finally, the Y factor is simply the number of years since the project was  
11 completed. By considering additional data, plaintiffs' expert testified EOR determined the  
12 annual volumes contained in the various exhibits. The ultimate volume is set out annually  
13 and totally on Plaintiffs' Exhibits 331-336, inclusive. The total volume contained in each of  
14 these exhibits is the result of the application of this formula and represents the alleged  
15 cumulative impact of the project associated with lost storage over the life span of the project.  
16 Mr. Olivier testified that "S" in the formula represented the lost storage capacity of the  
17 particular upper lake body as a result of that project. In other words, it is his opinion that S  
18 is the result of the natural outlet elevation being lowered. This in turn means that S infers  
19 the upper lake's water elevation was at least at the original-outlet elevation in the first year  
20 and that by lowering it, that water volume discharged into the lower channel. By inserting  
21 .1865 as a multiplier, the formula then calculates that .1865% of that volume represented by  
22 "S" discharged into Devils Lake for each of the subsequent years.

23 The defendants claim that the formula assumes that each year of the life span of the project  
24 the water elevation of the upper lake body was at or would have been at the elevation of the  
25 original natural outlet elevation. Stated another way, they claim that the formula infers that  
26 each year in the project's life span the volume of water discharging into the upper lake body  
27 was such that each year it would have been able to take full advantage of the storage  
28 capacity of the upper lake body had the outlet not been lowered and that the water inflow  
29 would never be so low that the lake would not have filled up to the same elevation as the  
30 original outlet elevation. The plaintiffs dispute this.

31 The defendants are correct. The formula used to reach the total volume set out in Plaintiffs'  
32 Exhibits 331-336 inclusive uses the Y factor contained in the formula to multiply the  
33 resulting water volume of S by the number of years of the lifespan of the project to reach the  
34 total cumulative volume. So, by the plaintiffs using the Y factor in that fashion, the

1 defendants correctly state that it assumes the lake is full every year up to the original outlet  
2 elevation as determined by Olivier and EOR. By their formula the plaintiffs make S a  
3 constant number for each year of the life span of the project.

4 Mr. Olivier testified he used additional calculations to redistribute this total volume into  
5 annual volumes as contained in Plaintiffs' Exhibits 331-336 and Defendants' Exhibit 2242.  
6 He testified at TT Vol. 6 at p.1331-1332 as follows:

7 *Again, the weather data was used to make a determination on the first year*  
8 *drawdown. For the rest of the years a cumulative impact was calculated*  
9 *first and then it was distributed based on, with a weight, basing in terms of*  
10 *if the year was wet or was dry that would have some influence but it was*  
11 *basically looking at the Devils Lake Gauge and what is it that the lake tells*  
12 *us in terms of how the lake fluctuated. So it is distributed based on the flows*  
13 *that the lake received during that particular year, not necessarily about the*  
14 *precipitation or one particular gauge in the watershed which, from our*  
15 *perspective is more accurate.*

16 *So that total flow during that year that the lake received one particular year*  
17 *would be higher, one particular year would be lower and that we weighted*  
18 *those numbers, we weighted those impacts based on the amount of flow that*  
19 *the lake received in different years. So if it was one year that the lake*  
20 *received more flow we included an impact that would have been higher in*  
21 *that year. If it was a year that the lake received less flow then the impact of*  
22 *the total amount, cumulative impact an impact for that particular would be*  
23 *lower. That's how we distributed.*

24 *I mean, everything is linked. The precipitation data is included in a*  
25 *different way because in order to compute that flow in the lake we also had*  
26 *to use the precipitation data to compute the precipitation in the lake itself.*  
27 *So, I mean everything is linked, but basically it was based on gauge data in*  
28 *the lake.*

29 That description offered by Mr. Olivier tells us that the formula  $V = S + .1865 \times S \times Y$  is only  
30 part of the calculation used to reach the annual results displayed in Plaintiffs' Exhibits 331-  
31 336. There is no other sufficient evidence offered by Mr. Olivier that explains the rationale  
32 for or how he arrived at the annual estimates of "water inflow" for each project or the  
33 proportions assigned to that inflow or his source for them contained in Defendants' Exhibit  
34 2242. Except for the quoted testimony set out above, there is no other explanation to explain

1 how the additional data was "linked" to reach those annual volumes. Without doing so they  
2 cannot be reasonably scrutinized or analyzed by the defendants' or this court.

3 In any event, the defendants are correct in their arguments regarding the Y factor. All that the  
4 plaintiffs have done is to redistribute the total cumulative volume over the selected years.

5 It is evident that the formula used by Olivier and EOR to determine the cumulative total  
6 volume in Plaintiffs' Exhibit 331-336 does presume that each year the upper lake body would  
7 have been able to take full advantage of the storage capacity the plaintiffs claim was lost due  
8 to the modifications plaintiffs claim occurred from the alleged lowering of the natural outlet  
9 elevations. There is insufficient evidence in the record to support any of this. To the  
10 contrary, several years reflect low discharge flow and low upper lake body elevations.  
11 Redistributing or readjusting the total volume into annual impacts does not somehow cause  
12 this presumption unsupported by the evidence to gain credibility. The plaintiffs' argued at  
13 p.41 of its reply brief that the use of the .1865 factor somehow defeats the impact of S as a  
14 constant. That argument is unpersuasive. In the formula, S always remains the same and  
15 .1865 is simply a multiplier of S. Because that result is then multiplied by Y, the years in the  
16 life of the project, S never changes year to year. The manner in which S is used as part of the  
17 formula casts doubt on the reliability of the formula as a tool to reveal accurate results. In  
18 turn, it serves as another factor that casts doubt on the reliability of the plaintiffs' claim and  
19 its efforts to show that these projects by themselves or in combination with others were a  
20 proximate cause of the damages or taking claimed by the plaintiffs

21 608. The parties dispute whether it was appropriate for the plaintiffs to use the .1865 factor in its  
22 calculations. For reasons set forth below, the application of the factor .1865 as a coefficient  
23 in the above formula was an improper use of the factor, making the plaintiffs' calculations  
24 and their results unreliable:

- 25 a. As acknowledged by plaintiffs' expert, the factor, .1865, was derived from  
26 taking the 127,835 acre feet of wetlands volume potentially capable of  
27 restoration in the West Report and dividing that into the average annual  
28 runoff reduction in acre feet based upon 10 climate sequences of a 20 year  
29 duration, 23,841 acre feet.
- 30 b. Imbedded within the West Report that resulted in the creation of the .1865  
31 factor, was the use of climate sequences randomly selected for future events.  
32 The method used did not represent anything that *sequentially* and actually  
33 occurred in that pattern in the historical past within the Devils Lake Basin.  
34 The sequences were randomly selected. As a consequence, the factor of

1 .1865 cannot be relied upon to calculate runoff reduction from  
2 depression/pothole drainage or lost storage from the beginning year of any  
3 particular project to 2005. this factor and the model do not reflect the actual  
4 climate and weather circumstances actually experienced in sequence during  
5 this same historical time period. By failing to embed within the model,  
6 climate sequences that were historically accurate and sequentially accurate  
7 to what has been actually experienced since the beginning of any project to  
8 the present, there is simply no way of determining if this factor, .1865, is  
9 reliable. If this factor is not reliable then neither are the ultimate  
10 calculations.

- 11 c. So, use of and reliance on the "average" runoff reduction which created the  
12 .1865 factor only creates questions of reliability. Those questions have not  
13 been answered simply by Mr. Olivier testifying he verified the factor by his  
14 "own running" of the project model for the years 1985-2002 when the  
15 methodology and documentation of that has not been sufficiently provided  
16 for scrutiny and analysis by the defendants or the court. This court agrees  
17 that absent an ability to subject these claims to analysis and study, it makes  
18 the claims untrustworthy.
- 19 d. It was acceptable for West Consultants to use an average in its model that  
20 arrives at this .1865 factor. They were attempting to forecast an estimate  
21 using random future climate sequences. This is significantly different than  
22 the inquiry attempted by plaintiffs' expert. As previously explained, Doctor  
23 Walton expressed real concern over this application of the West report to  
24 EOR's efforts because among other reasons, the .1865 factor was derived  
25 from an averaging of many years of water volume. As Doctor Walton  
26 stated, the West Study had no "*demonstrated relationship to prior climate*  
27 *sequences*". (Trial Transcript p.3551).
- 28 e. The lack of reliability that the .1865 factor has is even reflected in the  
29 figures set out in Plaintiffs' Exhibit 463, p.68, Table 6-9 and Table 6-10  
30 p.72. Depending on the climate sequences used, the total and average run  
31 off can have a significant variation. If you consider the "wet" sequence, the  
32 variation is even greater. That significant variation is also true for the  
33 annual runoff reduction. Since it is the average of all these climate  
34 sequences that is considered in reaching the .1865 factor (except the "wet"

1 year sequences), it is apparent how failing to take into account the actual  
2 historical climate sequences in proper order would significantly impact the  
3 resulting percentage of restored volume. Without considering all of the  
4 other issues relative to its use, this would adversely impact its reliability in  
5 the formula used by the plaintiffs.

6 f. Reliance on the .1865 factor is suspect and the "averaging" feature  
7 imbedded in it when considering the calibration results disclosed in the West  
8 Report. In Plaintiffs' Exhibit 463 at p.2 of App. D the calibration results  
9 show wide variations in many of the individual subject years from 1985 to  
10 1999 inclusive. In any given year and as acknowledged by Mr. Olivier the  
11 volume flows computed in the PRINET model could be 50%to 200% off  
12 from observed volume flows. Mr. Olivier acknowledged that a calibration  
13 less than 70% was not a good one.

14 g. The plaintiffs' independent calibration efforts are unreliable as set forth in  
15 Findings of Fact Number 609.

16 h. The .1865 coefficient factor used by the West Report was developed from  
17 the delineation and then analysis of depressions and potholes which as noted  
18 by Doctor Ray Walton were of a small size, most of which were under two  
19 feet in depth. As he notes none of them had outlets and none of them had  
20 inlets. Although some of the lakes do constitute wetlands as described by  
21 Steve Hoetzer, Doctor Walton specified that their analysis was of  
22 depressions and potholes and not typical wetlands. Relying upon Doctor  
23 Walton's significant and broad experience both in hydrology projects and  
24 modeling, and his intimate familiarity with the West Report, his opinion is  
25 given significant and greater weight than that of Mr. Olivier. Therefore, this  
26 also impacts the reliability of the .1865 factor from the West Report when  
27 calculating the claimed impact of these different lakes in the upper basin.

28 609. Plaintiffs' expert, Cecelio Olivier, claims that this .1865 factor was independently calibrated.  
29 However, he gives little explanation of how this was done. His limited description of the  
30 effort as contained in Trial Transcript, Volume 8, p.1707 was as follows:

31 *We took the number, as I explained before, that is shown as a percent of*  
32 *restored volume average for the total restored – 100% restoration scenario,*  
33 *which is roughly about 23,000, and divide that number by the total number*  
34 *of acre feet that were lost in the basin to come up with the coefficient, .1865.*  
*And, because this is a number that is derived from a forecasting, what we*  
*also did is we, actually run – maybe I can, we actually took the results from*

1        *PRINET for the years that we were running it under the drain scenario,*  
2        *which is 1985 to 2002, to come up with the total volume into the lake and*  
3        *divided by the number of years, and came up to a number that is, you know,*  
4        *within a couple of percentages to this number. So, we actually did our*  
5        *independent verification, since this is forecasting, we use – we went and*  
6        *verified in the past, run that model and come up with a number that was*  
7        *fairly close to this. So, for simplicity purposes and just to be able to use the*  
8        *PRINET as a research, we just decided to use this number and divide it by*  
9        *the PRINET number.*

10       Not only is this explanation unclear but it makes no adequate reference to other data that  
11       would allow anyone to verify or otherwise analyze what was stated in this answer as it relates  
12       to these calibration efforts.

13       610 This court appreciates that the .1865 factor represents an average as it relates to climatic  
14       sequences. But that is the flaw. The evidence clearly shows that Devils Lake fluctuates in  
15       response to the climatic conditions of the Devils Lake Basin. And, it is a distorted response.  
16       To use an average and to use a factor based on randomly selected climate sequences rather  
17       than of actual climate sequences consistent with the climatic history of the Devils Lake  
18       Basin, only leaves doubts on such a significant issue.

19       611. The plaintiffs opinions made through their expert, Cecelio Olivier, that the outlet structure  
20       projects for Lake Irvine, Lake Alice, Lake Ibsen, Sweetwater Morrison Lake, Dry Lake and  
21       Hurricane Lake contributed to the increased elevations of the water expended on Devils Lake  
22       are unreliable. This is based on the previous findings addressing those specific projects.  
23       Based on this there is insufficient evidence to allow this court as a fact finder to determine  
24       that these projects individually or together with the channel improvement projects were a  
25       proximate cause of any damages or taking claimed by the plaintiffs. As set forth in the  
26       previous findings, there were often multiple reasons for this determination. To the extent  
27       these projects were represented by the plaintiffs to be a contributing component to one or  
28       more of the other projects, the evidence established their claimed contributions were quite  
29       small.

30       612. The plaintiffs through their expert, Cecelio Olivier, claim that the multiple channel  
31       improvements which were a part of the government projects identified in this action and  
32       testified to were a proximate cause of damages or taking of their properties claimed by the  
33       plaintiffs. Mr. Olivier has opined that these channel improvements resulted in a significant  
34       part of the waters discharging into Devils Lake over the life of these channel improvements  
35       to be proximately caused by the channel improvements themselves or in combination with  
36       the other projects.

1 The water volume attributed to these projects has not been quantified. Mr. Olivier instead  
2 asserts that based on his professional opinion the volumes discharging due to these channel  
3 improvements in combination with each other and/or with other projects are a significant  
4 factor in the rise of Devils Lake

5 The plaintiffs have not offered sufficiently reliable evidence to support this opinion and to  
6 explain how these different channel improvements worked in a way separately or in  
7 combination with each other and/or with other projects to cause more water to discharge into  
8 Devils Lake and be a proximate cause of the increased elevations experienced by the lake and  
9 any resulting damage to the plaintiffs' properties. There are a number of factors that required  
10 more than a broad conclusion and to instead require some determination of volume quantity.  
11 First, the waters of the upper basin naturally drain into Devils Lake. The only water that  
12 would not would be that water retained in upper basin storage and water lost through  
13 absorption, transpiration, or evaporation. Second, not all of these channels had the impact  
14 opined by plaintiffs' witnesses. Third, not all of these channel improvements were completed  
15 in a time frame to have an impact. Fourth, evidence was established to show that in the  
16 1990's the water budget of the basin substantially increased. Precipitation substantially  
17 increased. Evaporation and the rate of evaporation also substantially decreased. Fifth, during  
18 most of the time period that the channel improvements had been completed, Devils Lake was  
19 not manifesting any impact from them. Last, many of the channel improvements were also  
20 clean outs necessitated by years of drought that caused the channels to partially fill in with  
21 silt and vegetation.

22 For these and other reasons set out within this decision including those findings relating to  
23 these particular projects, this court finds that plaintiffs have failed to meet their burden of  
24 proof. With the evidence presented it would be wholly speculative to find these channel  
25 improvement projects individually or together with each other and/or with other projects  
26 were a proximate cause of the damages or taking claimed by the plaintiffs' as to their  
27 properties.

28 613. There are other reasons that support the determination and findings that the plaintiffs have  
29 failed to establish that any damages or taking of their properties caused by the increased  
30 elevations of Devils Lake were proximately caused by the actions or conduct of the different  
31 government defendants and the projects for which they are alleged to be responsible. Those  
32 reasons include the following (with some of them previously cited):

- 33 a. The opinion of Mr. Olivier as to the percentages assigned to the contribution  
34 of water volumes to Devils Lake for certain projects is inconsistent in

1 evaluating his testimony and also the court's calculations. Based on the  
2 water volumes Olivier calculated were contributed to Devils Lake by certain  
3 water projects as identified in the exhibits above, Plaintiffs' Exhibits 331-  
4 336 inclusive, he testified and assigned to them certain percentages of  
5 contribution. (As explained in previous findings, this court is of the opinion  
6 that even if this basic methodology was correct, it failed to include all the  
7 years for inflow in which damages are claimed. So, it is too low). For  
8 Olivier's wetlands calculations this court assigned a percentage contribution  
9 due to his claim relating to wetlands drainage and using an inflow into  
10 Devils Lake of 5,000,117 acre feet. These percentages were as follows:

| PROJECT                  | LOW (%) | HIGH (%) |
|--------------------------|---------|----------|
| Hurricane Lake           | .24     | .52      |
| Sweetwater/Morrison Lake | .87     | 1.77     |
| Lake Ibsen               | .19     | .19      |
| Channel A (Dry Lake)     | 2.49    | 2.49     |
| Lake Irvine              | 1.87    | 1.87     |
| Lake Alice               | .2      | .2       |
| <hr/>                    |         |          |
| TOTAL                    | 5.86%   | 7.04%    |
| Wetlands Drainage        | 7.8%    | 14.7%    |
| (391,384 Acre Feet Low)  |         |          |
| (734,162 Acre Feet High) |         |          |
| GRAND TOTAL              | 13.66%  | 21.74%   |

18 Mr. Olivier also testified that based on the lost storage impacts from those  
19 government projects identified above, together with the amount of water from  
20 wetland drainage that he claims occurred that can be attributed to water  
21 volumes reaching Devils Lake because of the government projects, that all of  
22 the projects are responsible for a minimum of 18.57% to 30.08% of all of the  
23 water that has flowed into Devils Lake from 1957 until the time of trial.  
24 (Volume 8, p.1726, line 17-25, p. 1727, line 1-6). Later however, at Volume  
25 8, p.1729 Mr. Olivier testifies that the high and low range of impact is 27% to  
26 42.4%. It is not evident from the testimony and evidence in the record why  
27 there are such distinctions in these last two opinions of percentage impact  
28 offered by Mr. Olivier or for that matter in the court's own calculations set out  
29 above.  
30

31 It appears that the lower figures are based upon his application of simply raw  
32  
33  
34

1 gauge data of inflow into Devils Lake over the subject period. His higher  
2 percentage calculation appears to look at the elevation of Devils Lake, 1448.2  
3 feet and then determining the volume of the lake based upon elevation to  
4 come up with 2,550,900 acre feet. Doing this accounts for evaporation which  
5 Olivier admittedly did not account for in at least his earlier six lost storage  
6 calculations. That would result in an inappropriate and inaccurate comparison.  
7 This second opinion by Mr. Olivier that the impact was 27% to 42.4% came  
8 about after he had been subject to cross examination. (See T.T., Vol. 8,  
9 p.1716-1720). He had acknowledged that his earlier opinions especially  
10 relating to the six outlet control structure projects and the percentage impact  
11 assigned to them did not account for evaporation once the water entered into  
12 the lake. In response he did a second calculation and in later testimony  
13 offered this second opinion with higher percentages. That did not cure the  
14 flaw in Mr. Olivier's opinions revealed by that cross examination.

- 15 b. During additional cross examination Mr. Olivier acknowledged that the .1865  
16 factor did not account for evaporation of the discharging water once it flowed  
17 into Devils Lake. (T.T. Vol. 8, p.1767, 1.11-24). There he testifies:

18 A. *We're saying that 12,000 acre feet, is the impact in Devils Lake,*  
19 *though those years.*

20 Q. *Over 1977 to 2005?*

21 A. *That's correct, yes.*

22 Q. *And, you're also saying that that includes the amount of water that's*  
23 *evaporated on Devils Lake with that 12,000 acre feet?*

24 A. *That's the amount of water that got into Devils Lake.*

25 Q. *That's not how much water evaporated, once it was in Devils Lake?*

26 A. *No, that doesn't include --*

27 Q. *That's a different number?*

28 A. *Yes.*

29 So, by offering this second and higher opinion, Mr. Olivier seems to  
30 disregard his own recognition that the .1865 factor did not account for the  
31 evaporation once the water was in Devils Lake. Making the second analysis  
32 does not correct the flaw contained in his opinion. He is simply making an  
33 apples to oranges comparison. If he removed from his comparison the water  
34 volume removed from Devils Lake over time by evaporation or other

1 reasons, he should have done the same for the amounts he opined discharged  
2 into the Devils Lake due to the projects, as a portion of these claimed water  
3 volumes were part of what went out of Devils Lake. The fact that Olivier's  
4 opinions do not account for the loss of these waters through evaporation or  
5 otherwise once they reach Devils Lake is very significant. As even the  
6 plaintiffs note, all the water commingles once in the lake. So, before fault  
7 can be assigned to this inflowing water as a proximate cause of the claimed  
8 damages, the final impact must be measured. It was not. The difference  
9 was likely very significant as set forth in the next sub finding.

- 10 c. The methodology used by Mr. Olivier in reaching his opinion does not  
11 account for evaporation or other loss of water in Devils Lake once it  
12 discharged into the lake by the volumes he has claimed. This is a significant  
13 consideration that has been overlooked by him. As manifested by  
14 Defendants' Exhibit 2242, 6,000,727 acre feet of water have discharged into  
15 Devils Lake since 1957, the year of the first project. In 2006 the volume of  
16 Devils Lake was 2,718,943 acre feet. In 1957 the volume of Devils Lake  
17 was 411,138 acre feet. This commingled with the inflow water.  
18 Consequently, the 1957 volume should be added to the 2006 volume  
19 because that is part of the total volume available and also subject to future  
20 loss from the lake. Added to 6,000,727 acre feet, the grand total is  
21 6,411,865 acre feet. Subtracting this from 2,718,943 acre feet equals  
22 3,692,922 acre feet. This was the water volume lost from Devils Lake  
23 between 1957 to 2006 inclusive due to evaporation or drainage into Stump  
24 Lake. This is 57.6% of all of the water flowing into Devils Lake since 1957.  
25 (3,692,922 acre feet divided by 6,411,865 acre feet). It is recognized that  
26 this analysis does not account for water volume in the lake attributable to  
27 direct runoff and direct precipitation on the lake. (But none of the experts on  
28 either side have felt it necessary to account for this). As Mr. Olivier has  
29 noted, all of the water has commingled. So, this approximate loss from  
30 Devils Lake itself should have been accounted for in making the calculations  
31 and offering these opinions. It was not. As a result, Mr. Olivier is seeking  
32 to assign causation for damages from water he claims came into the lake but  
33 also left it in a proportion of approximately 57.6 percent. It means that  
34 plaintiffs are seeking to assign causation to what the defendants have fairly

1 labeled "*phantom*" water. (Some additional explanation on this issue is also  
2 found at Finding 433).

- 3 d. Doctor Raymond Walton, who was closely involved with the preparation  
4 and publication of the West Report emphasized in his testimony that the  
5 .1865 factor incorporated as a means of reaching its determination in the  
6 West Report used random climate sequences for future conditions and did  
7 not address the historical climate sequences that in fact occurred between  
8 1957 and 2005. Consequently, Doctor Walton was of the opinion that the  
9 use by the plaintiffs of the .1865 factor in this formula imbedded within the  
10 future random climate sequences was improper and therefore makes the  
11 calculations unreliable. This court agrees.
- 12 e. As previously indicated, this court found that the calibrations plaintiffs  
13 claim to have made are not sufficiently set out in the evidence to allow this  
14 court to find that the adoption of this factor to the plaintiffs' expert's study  
15 can be used with any reasonable degree of confidence. In fact, this court  
16 finds it interesting (for lack of a better term) that with the detailed process  
17 by which the West Report and model was built and calibrated, that plaintiffs  
18 would come up with the same figure or adopt it. Although the plaintiffs'  
19 expert says that their calculation was so close that they decided for sake of  
20 simplicity they would use the West figure, there is no testimony of what  
21 factor plaintiffs actually came up with and how that factor was determined  
22 other than the vague description previously cited.
- 23 f. This court agrees with Doctor Walton's opinion that the application of the  
24 West Report calculation to lakes was inappropriate and unreliable without  
25 proper calibration. As Doctor Walton testified, a vast majority of the  
26 depressions and potholes included in the West Report were one to two feet  
27 in depth. Although at least two of the lakes constituted wetlands, some of  
28 the lakes were eight to ten feet deep. Further, the West Report specifically  
29 excluded the lakes and wetlands from its study and analysis and only  
30 considered depressions that were of a smaller size and depth. Also, as  
31 Doctor Walton pointed out, the depressions studied were different in  
32 characteristics not only from the standpoint that they were far more shallow  
33 than the lakes that Olivier and EOR analyzed, but they did not have inlets  
34 and outlets that these different upper basin lakes had. All of this caused

1 Doctor Walton to opine that without specific and detailed calibration of the  
2 .1865 factor to the lakes or bodies of water similar in character that the study  
3 and estimated reduction factor of .1865 was not reliable for the purposes  
4 used by the plaintiffs. Any calibration actually performed by plaintiffs was  
5 not explained at trial in a manner sufficient to analyze it.

6 g. How evaporation of upper basin surface waters may have been adversely  
7 impacted by these projects was a key part of the plaintiffs' theory of their  
8 case. It is recognized that the greater the water surface the greater the  
9 volume of water that will be lost to evaporation, all other factors being  
10 constant. So, a water body that is deep but has a small surface area will not  
11 have as much evaporation loss as a water body that is shallow but has a  
12 greater surface area even when the deeper water contains a greater water  
13 volume. However, the complexities of the Devils Lake Basin does not allow  
14 for easy conclusions based on this scientific premise. In practical application  
15 what impact these projects have had, if any, has only been shown as to  
16 Channel A through Doctor Woodbury's testimony.

17 h. The presumption made by the plaintiffs in their use of a "Y" factor as a  
18 multiplier incorporated an unproved fact that the respective lakes would  
19 have had sufficient inflow of water volume each and every year of the life  
20 span of the project to have used up all of the storage capacity available as if  
21 the natural outlet elevation was in place. In fact there is no evidence of this.  
22 To the contrary, evidence from the channel gauge flows during some of the  
23 periods of time, especially until 1993 more likely suggests that this was not  
24 the case at all. Consequently, the calculations that incorporated the  
25 presumption for use and application of the Y factor were inappropriate. And,  
26 it is clear from the formula itself that this was the impact from the use of  
27 "Y" in the formula. Although Defendants' Exhibit 2242 displays the  
28 numbers used to calculate and redistribute cumulative impact into annual  
29 impacts in Plaintiffs' Exhibits 331-336, an adequate explanation for doing it  
30 in this manner has not been provided. The source and rationale for the  
31 "estimated inflow" have not been adequately explained in a manner to rely  
32 upon them. The rationale for each of the annual proportion figures has not  
33 been adequately provided. Without being able to verify all these concerns,  
34 reliance on them is not appropriate. Further, defending this by citing that the

1 formula imbedded in it an "average" component within the .1865 factor is  
2 not persuasive. That is because you still start out with 'S as a constant never  
3 changing number in the formula.

4 i. As it applies to several of the outlet structures and their level of function as  
5 well as the natural outlet elevations presumed by the plaintiffs, these also  
6 were often inaccurate. They have been previously addressed.

7 j. Notwithstanding the plaintiffs' claim that these 15 projects impacted the  
8 water elevations of Devils Lake discharging more water into it than would  
9 otherwise have occurred but for the projects, the history of the lake  
10 elevations are inconsistent with that claim. The first of these projects was  
11 commenced in 1957. That was the Lake Irvine control structure. That was  
12 followed by several other projects especially in the 1970's including the  
13 Cahio Coulee channel improvements, channel improvements between  
14 Mike's Lake and Chain Lake, Mauvais Coulee channel improvements below  
15 Lake Irvine, the Hurricane Lake control structure, the Lake Ibsen control  
16 structure, and Channel A in 1979. Up to that point the volume of water in  
17 Devils Lake increased but never even reached the high water mark of 1426  
18 feet. Once Channel A, (the largest project and the one that created the  
19 shortcut of water flow for discharge into Devils Lake) was completed the  
20 high water mark was reached and slightly exceeded. Then, however, over  
21 several years until 1993 the volume of the water in the lake decreased. This  
22 is notwithstanding the fact that Channel A by that time had been established,  
23 and Morrison Lake and Starkweather Coulee channel improvements had  
24 been made.

25 Beginning in 1993 voluminous acre feet of water began to discharge into  
26 Devils Lake. This is in the same time period as the wet phase of the climatic  
27 change described by Professor Osborne. Particularly, if Channel A and then  
28 the channel improvements and work on Morrison-Sweetwater Lake and  
29 watersheds above it had a measurable impact on the additional discharge of  
30 the water into Devils Lake, one would have expected to experience that soon  
31 after 1979. But that does not happen. Instead, the water flows discharging  
32 into Devils Lake are more consistent with climatic circumstances related to  
33 drought, wet cycles, major storm events, or rapid spring snow melt.  
34 Therefore, Gregg Wiche's assertion that the climatic circumstances of the

1 Devils Lake Basin distort the lake elevations is more consistent with the  
2 discharges that Devils Lake has experienced over a long period of time, than  
3 with Plaintiffs' theory.

4 This history of lake fluctuations is much more consistent with the  
5 explanations offered by the defendants than that claimed by the plaintiffs.  
6 So, as a symptom for the cause of the lake's changes this court is far more  
7 inclined to find that those symptoms support the defendants' explanation  
8 rather than that of the plaintiffs. In that respect it becomes more persuasive  
9 for the defendants.

10 k. The opinion of plaintiffs expert, Cecelio Olivier, is neither reliable or  
11 persuasive as it relates to his assertion of water volumes he claims have  
12 discharged into Devils Lake from depressions and potholes identified in  
13 studies as possibly drained. This is based on previous and later findings in  
14 this decision.

15 l. Although the plaintiffs opine that the channel improvements made in the  
16 different government projects caused substantially more water to discharge  
17 into Devils Lake than would have otherwise done so without these channel  
18 improvements, that is neither reliable or proven:

- 19 1. There has been no quantification of the claimed impact of these  
20 projects. Consequently, to label their impact as "substantial" or  
21 significant" only begs the question.
- 22 2. The opinion is based on facts which were presumed but incorrect as  
23 previously set out in the findings.
- 24 3. The projects improved water flow in the area of improvements and as  
25 found improved drainage of lands adjoining the channel  
26 improvements. However, there still is no explanation or calculation of  
27 how much extra water discharged into Devils Lake because of the  
28 improvements.
- 29 4. Many of the channel improvements were only cleanouts or a  
30 combination of cleanouts and actual improvements.

31 j. The methodologies used by Mr. Olivier would likely have resulted in double  
32 counting of the volume impacts claimed by the plaintiffs for lost storage  
33 capacity of upper lake bodies and the impacts claimed by them for drainage  
34 of wetlands. This is more fully explained in Finding of Fact 621(e)

614. Throughout the trial the plaintiffs expert, Cecelio Olivier, occasionally referred to the *bounce*  
effect that may occur on the different lake bodies. Essentially this *bounce* effect is the ability  
of a lake body to "bounce" higher than the natural outlet elevations. It is dependent on such

1 things as the condition and physical characteristics of the lake and a lake's outlet. It results in  
2 a greater volume of water existing in the lake than might otherwise be.

3 Olivier noted this effect to assert that his calculations were more conservative than might  
4 otherwise be because of his not taking into account the "bounce" effect. But he agreed it was  
5 difficult to calculate and offer no calculations as to the impact.

6 This court in its effort to make findings did not consider this bounce effect. It appeared that  
7 this bounce effect was subject to the dynamics and variables impacting the lake or its outlet at  
8 any given time. Considering this and the fact that there was no effort to in some degree  
9 quantify it, it would have been speculative for the court to consider it.

10 615. A proximate cause for damages is a cause which, in natural and continuous sequence,  
11 produces the injury and without which the injury would not have occurred. Klimple v. Bahl  
12 2007 N.D. 13 ¶5, 727 N.W. 2d 256. For damages to be recoverable for a proximate cause of  
13 the acts of another party those damages that are a consequence of that cause must have been  
14 foreseeable. Bumann v. Maurer 203 N.W. 2d 434, 439 (N.D. 1972). Defendants claim that  
15 any damages or harm suffered by the plaintiffs as a result of the flooding of their lands were  
16 not a proximate cause of any acts of the defendants because those damages or harm were not  
17 a foreseeable consequence of their acts in implementing any or all of the projects in which  
18 they were involved. This court finds that even had plaintiffs proved that some or all of these  
19 projects were a cause in fact of the damages and taking claimed by the plaintiffs, that they  
20 were not foreseeable. Therefore, this would preclude a finding that any of the acts of the  
21 defendants were a proximate cause of any harm or damages the plaintiffs claim. This is  
22 based upon the following:

- 23 a. Many of these projects were initiated at different times by different  
24 government agencies. There was no sufficient evidence presented at trial  
25 that would allow a person to reasonably infer that this dramatic flooding  
26 experienced particularly since 1993 was foreseeable at the time that these  
27 projects were developed. The only concern expressed related to downstream  
28 flooding of the channel improvements in the Starkweather watershed. But,  
29 that related to flooding along or adjacent to roads under which the channel  
30 passed and which may cause backup of water at that location during high  
31 volume.
- 32 b. Steven Hoetzer acknowledged that engineering standards during the time  
33 periods that these projects were developed, called for an impact study.  
34 However, that impact study was to review the historical data so as to design  
the project in a way to handle a one rainfall, one twenty-four hour, ten year  
event. The projects by engineering standards were never designed to  
address any potential impact over a period of years or over even a one year  
time frame. That is, impact from cumulative events were not and are not

1 now part of any standard engineering practice in designing a water project.  
2 No professional opinion was offered to assert there was a duty to consider  
3 the impact of other projects in other water districts.

- 4 c. There is no evidence that the modeling or technology used in this trial and  
5 the significant computer technology used in the modeling, projections, or  
6 studies were available when the identified projects were implemented to  
7 allow for projection and forecasting of impact to this degree.  
8 d. This court has determined that there has been a climatic change based upon  
9 the evidence presented that began in the 1970's but did not result in a  
10 manifestation of it until the 1980's and that a wet cycle of that change  
11 occurred in the 1990's. As Professor Osborne testified, it cannot be  
12 determined that a climatic shift or change has occurred until you are well  
13 into it. Consequently, it would have been impossible for the party  
14 defendants to design these different projects with an ability to foresee the  
15 likelihood of a change in climatic conditions within the Devils Lake Basin.  
16 The suggestion by plaintiff that because this is a cycle that it means that  
17 there was a previous cycle and therefore predictable is unpersuasive. The  
18 variables involved in long term climate and weather prediction are as  
19 Professor Osborne pointed out, incapable of prediction until you are in the  
20 middle of it.

21 Based upon the above, this court concludes that even if these projects had some impact on the  
22 increased water elevations of Devils Lake, that impact was not foreseeable in light of the  
23 reasons stated herein.

24 616. There is a dispute between the parties of whether the plaintiffs are required to quantify in  
25 terms of water volume the impact each of these government projects or a combination of  
26 them had on the increase of the water elevations of Devils Lake. Although that requirement  
27 is not mandated as a matter of law, under the unique facts of this case evidence that would  
28 allow this court as a fact finder to find the volume of water adversely impacting the  
29 elevations of Devils Lake due to these projects requires some reasonable degree of  
30 quantification. This is for the following reasons:

- 31 a. As previously found and fully accepted, the water body of Devils Lake is the  
32 natural end point of the water drainage system of the Devils Lake Basin.  
33 The only exception to that is the Stump Lake watershed sub-basin which  
34 drains into Stump Lake.<sup>9</sup> All of the other watersheds drain into Devils Lake.  
35 b. That means that unless water is retained in storage by the different chain of  
36 lakes, wetlands, and depressions or potholes; or is lost through absorption  
37 into the soils, transpiration or by evaporation; that all of the waters will drain

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38 <sup>9</sup> Current news reports indicate that the waters of Stump Lake and Devils Lake  
39 are at the same surface elevation. Therefore, under those circumstances the  
40 Stump Lake watershed sub-basin would also contribute to the waters of Devils  
41 Lake.

1 into Devils Lake as a matter of natural course. So, it is undisputed some  
2 amount of water is going to naturally discharge into Devils Lake

3 c. The plaintiffs' complaint alleges that the identified government projects by  
4 their design and use have caused *more* waters to flow into Devils Lake than  
5 would otherwise have done so without the presence of these projects. Even  
6 they knew there was a need to make a comparison and therefore quantify the  
7 impact of these projects.

8 d. As a component of proving these projects were in fact a probable cause for  
9 the increased lake elevations, the plaintiff must show that the projects were a  
10 *substantial* part in bringing about any injury or damage. This is undisputed.  
11 To make that finding as a fact finder, this trial court must be able to refer to  
12 specific facts to support that conclusion. Otherwise, all that would be  
13 required of the fact finder to show factual support is to quote the words of  
14 the required legal standard. You end up answering the question with the  
15 words used to pose the question "*Q. Why is it substantial? A. Because I*  
16 *find it is substantial. I find it is substantial because witness X testified it*  
17 *was substantial*". Without quantifying what the plaintiffs claim is  
18 substantially more water discharging into the lake, especially when Devils  
19 Lake is recognized as the endpoint of the basin's drainage system anyway,  
20 only allows this court to speculate what is meant by "*substantial*". So, the  
21 circumstances and facts require the term "*more*" to be explained in actual  
22 volume of water - not broad adjectives.

23 e. Particularly as it relates to the projects described as channel improvements,  
24 none of them are sufficient to make such a finding. Some of those channel  
25 improvements were described in the evidence as being insignificant due to  
26 the volume or nature of the work done or without any impact. Some  
27 involved not only the widening and deepening of channels, but also the  
28 cleaning of the same channels because they were filled with silt and other  
29 debris and vegetation resulting from years of drought and low water flow.  
30 Most of the channel improvements failed to include evidence of the channel  
31 capacity prior to the made improvements. The identified channel  
32 improvements essentially establish that they allowed more water to flow  
33 more freely at the points of the improvements. But, there was not evidence  
34 presented as to how this water then moved beyond that all the way into  
Devils Lake itself. More importantly, none of the evidence adequately  
addressed how these improvements impacted both volume increase for  
Devils Lake and evaporation. Consequently, none of these channel  
improvements were sufficient to compel this court to find that they had a  
substantial impact and therefore constituted a probable cause for the  
increased lake elevations experienced on Devils Lake.

f. For the other opinions relating to the impact of the outlet structures, the  
plaintiffs did quantify the alleged impact. This particularly related to the  
waters allegedly discharging into Devils Lake due to lost storage capacity in  
different upper basin water bodies as well as the claim for water allegedly

1 discharged into Devils Lake from the depressions and potholes in the upper  
2 basin. These opinions allowed this court to make findings within this  
3 decision related to those particular projects.

- 4 g. Under the facts of this case and from the evidence presented, the only  
5 reliable way of determining as a factual finding whether any of these  
6 projects were a proximate cause of the increased lake elevations experienced  
7 in Devils Lake was through quantifying their impact.

8 Based upon all of the above, this court agrees with the defendants that as to the facts of this  
9 case and for reasons noted above, and considering the other findings in this decision, the  
10 failure to quantify the projects would require the court to speculate in any effort to determine  
11 if the legal standard had been met due to the projects' impacts, if any. This court is driven to  
12 reach this determination not because of any view of the law, but because the facts of the case  
13 mandate it in order to substantiate the legal standard.

- 14 617. As a component of proximate cause it requires that it be a cause which had a substantial part  
15 in bringing about any injury or damage. Beilke by Beilke v. Coryell 524 N.W. 2d 607, 609  
16 (N.D. 1994). As previously determined in earlier findings made by this court, the plaintiff  
17 has failed to establish this component. For their claims that certain projects had an impact on  
18 and caused a decreased storage of water on different upper basin lakes thereby causing  
19 discharge of a part of that water into Devils Lake, this court has previously found that those  
20 separate projects would not constitute a substantial part in any damages claimed and suffered  
21 by the plaintiffs. This applies to the damages and harm to their properties claimed by the  
22 plaintiffs for Hurricane Lake (Plaintiffs' Exhibit 331), Lake Alice (Plaintiffs' Exhibit 332),  
23 Lake Irvine (Plaintiffs' Exhibit 333), Sweetwater/Morrison Lakes (Plaintiffs' Exhibit 334),  
24 Dry Lake (Plaintiffs' Exhibit 335), and Lake Ibsen (Plaintiffs' Exhibit 336). As previously  
25 found, there is insufficient evidence for this court to determine that any of the other projects  
26 that involved channel improvements caused more water to discharge into Devils Lake than  
27 would but for the projects and in any quantity that would also allow this court to find that it  
28 constituted a substantial part or cause of any damages or harm suffered by the plaintiffs. This  
29 finding considered these projects not only individually but in combination with each other.  
30 This finding considered an evaluation of potential impact not only immediately but through  
31 the events and project that followed one another. The finding is based on a totality of all of  
32 the findings set out in this decision.

33 The unfortunate and more likely conclusion is that the plaintiffs would have suffered these  
34 damages in any event, and the evidence does not indicate climatic relief at any time soon.

As for the claim relating to "wetland" drainage, this claim was rejected by the court for other  
reasons set out in prior Findings. So, there is no need to consider this issue as to that claim.

1 618. For the conduct of the defendants to be subject to a claim for inverse condemnation they  
2 would have been required to engage in a deliberate act for a public purpose. Knutson v. City  
3 of Fargo 2006 N.D. 97 ¶13, 714 N.W. 2d 44. All of the originally listed 15 projects with the  
4 exception of the Creel Bay Dike and the Hurricane Lake outlet channel and control structure  
5 (and the ring channel claim and Mauvais Coulee channel improvements claim above Lake  
6 Alice which were not pursued) were projects that were deliberately initiated by one or more  
7 of the defendants who have been identified by the court as responsible for them in previous  
8 Findings. This included the Hammer-Sullivan Drain. By the time the Hurricane Lake outlet  
9 channel and control structure was functional as explained in earlier findings, it was under  
10 control of a separate and new political subdivision, the Hurricane Lake Joint Water Control  
11 District, a not-party.

12 As previously determined none of the defendants were involved in the Creel Bay Dike  
13 project. Therefore this could not constitute any deliberate act on their part. They are not  
14 subject to liability for it on this basis. This has been previously established in other findings.

15 Although the plaintiffs have continually agreed that the defendants are not responsible for  
16 private drainage, they continue to also assert they are responsible for waters claimed to have  
17 flowed from this source and ultimately into Devils Lake. Based on this theory the plaintiffs  
18 seek to assess responsibility to the defendants for lost storage existing in depressions or  
19 potholes throughout the upper portion of the Devils Lake Basin. That issue has been  
20 addressed in previous findings. In any event, there is no evidence any of the defendants  
21 facilitated the actual drainage of any upper basin depressions or potholes. There is no  
22 evidence in the record that they directed these acts to be done, if they were done.

23 The plaintiffs key witness, Steven Hoetzer and Cecelio Olivier acknowledge that they had no  
24 knowledge or information of the defendants performing any of private drainage activity  
25 relating to the identified depressions and potholes in the West Report and USFWS Study.  
26 So, this drainage, if any, of these identified depressions and potholes cannot constitute a  
27 deliberate act. (And this court appreciates that it is not the basis of plaintiffs' claim as it  
28 relates to this).

29 619. As part of its response to the plaintiffs' claim and challenge to the calculations and analysis  
30 done by the plaintiffs' expert, Cecelio Olivier, as it related to "wetland" storage impact, the  
31 defendants had Doctor Lawrence E. Woodbury prepare an opinion regarding this topic. It  
32 was included in Plaintiffs' Exhibit 472. In their closing briefs neither the plaintiffs nor the  
33 defendants offered little, if any analysis of this part of Doctor Woodbury's opinion.  
34 However, this court is inclined to address it. Doctor Woodbury offered an opinion that if the

possibly drained depressions and potholes identified in the West Report experienced a 100% restoration of its water storage capacity from 1993 through 1999 inclusive (7 years), that there would be a total volume reduction in Devils Lake over that time period of 218,351 acre feet. Doctor Woodbury's analysis included the following:

- a. Only the time period 1993-1999 inclusive were used. These were the years used in the West Study to make its calculations for the "wet scenario". So, that was the time period calculated by Doctor Woodbury.
- b. Using the analysis of the West Report and the application of a "wet scenario", that report provided that there would be an average annual runoff reduction of 31,193 acre feet based on the 100% restoration scenario. This was the scenario used by Doctor Woodbury
- c. By using the gauges of Channel A and Big Coulee for the years 1993-1999 inclusive the average total acre feet of inflow was 281,080 feet. The calculation made by the West Report was for average figure was 264,778 acre feet of average annual runoff.
- d. By applying the 31,193 acre feet under the wet scenario to 7 years duration, the total comes to 218,351 acre feet. Doctor Woodbury concludes this would be the total volume reduction into Devils Lake if the identified depressions and potholes were restored.

620. This analysis has no impact on this court's previous findings, nor is it supportive of any proposition that it constitutes proof that any of the projects had an impact on the increased elevations of Devils Lake. This is for many of the reasons this court has set out in rejecting the plaintiffs' opinion regarding the impact of the wetland depressions and potholes. It is also based upon the following:

- a. The West Report delineated and identified possibly drained depressions and potholes for the purpose of determining their potential storage capacity for future events. There was nothing in the West Report that stood for the proposition that there were waters existing at any time after these projects were implemented in these depressions or potholes and if so, how much. There was no evidence that any waters that otherwise would have been in storage in these depressions or potholes actually drained into the drainage channels of the upper basin and if so, how much. The significance of this is even more highlighted by the fact that the West Report specifically acknowledged that no proof was needed to show any of the identified depressions or potholes had been actually drained by man.
- b. There is no sufficient evidence that any water from these depressions or wetlands that might have drained into Devils Lake drained into it because of the implementation of any or some or all of the identified projects for which the defendants were involved.
- c. Mr. Olivier opines that the impact would be twice the amount opined by Doctor Woodbury. In their reply brief plaintiffs cite pages 4290-97 as his

1 testimony on this. However, most of this testimony related to the impact of  
2 Channel A, not wetlands damage. It was pages 4287-91 that addressed this  
3 issue. Mr. Olivier is of the opinion that Doctor Woodbury should have used  
4 the years 1985 to 2001. But, Mr. Olivier offers no opinion what result it  
5 may have had. The only other issue raised by Mr. Olivier is Doctor  
6 Woodbury's assessment of impact by adding the volume of water he  
7 calculated to the area of the lake in 2000 when (as correctly stated) the  
8 impact would be less than if it had been added to the area the lake had in  
9 prior years.

10 621. In its effort to make findings of fact this court developed many concerns over the reliability  
11 of the opinions of the plaintiffs' expert, Cecelio Olivier, as already noted. However, they  
12 are again noted here along with others to help explain the reasons why this court found that  
13 opinions from other experts offered by the defendants were more reliable:

- 14 a. Mr. Olivier based his elevations on what Steve Hoetzer told him and did not  
15 make an effort to verify that fact information from other resources. Some of  
16 them were inaccurate and that could have been easily determined in a review  
17 of the evidence exhibits.
- 18 b. Mr. Olivier made certain conclusions regarding Lake Irvine and Hurricane  
19 Lake, and a first year draw down for each of them, but then saw fit to change  
20 them after being cited contradictory evidence on cross examination. The  
21 readiness to agree that he had selected the incorrect year for when the project  
22 began and lost storage was experienced indicates either that he was  
23 somewhat casual in investigating the history of each project before making  
24 his calculations, or that upon seeing data inconsistent with his calculations  
25 chose to adopt a different view or opinion relating to the project initiation to  
26 accommodate his calculations.
- 27 c. As it relates to Plaintiffs' Exhibits 331-336 inclusive, Mr. Olivier offers no  
28 explanation of how precipitation data and other data was used to reach the  
29 annual impacts reflected in those exhibits.
- 30 d. No explanation sufficient to analyze the depressions or "wetlands"  
31 calculations have been offered so that those calculations could be subjected  
32 to some reasonable degree of scrutiny.
- 33 e. As noted by the defendants, Mr. Olivier's methodology in calculating the  
34 water volumes discharging into Devils Lake due to alleged lost storage and  
then his methodology used to make calculations for waters discharging into  
Devils Lake allegedly due to depressions drainage, likely results in the  
double counting of water because of the methodology used. Olivier uses  
lost storage in a number of chain of lake upper basin lakes to then opine that  
these waters allegedly deprived of upper basin storage in these upper basin  
lakes discharged into Devils Lake. He also opines that waters from certain  
possibly drained depressions or potholes identified by the West report and  
the USFWS Study discharged into Devils Lake. However, those waters that  
he claims discharged into Devils Lake from the identified drained

1 depressions or potholes would be waters that entered into the channels that  
2 in turn entered into the upper basin chain of lakes to find storage or in turn  
3 be subject to additional drainage. So, to the extent that there is any accuracy  
4 in this depression calculation, it also means that there is a real likelihood  
5 that Olivier is then taking this same water and discharging it through these  
6 different lakes before it discharges into Devils Lake. It likely constitutes  
7 double counting of water. The reason is because as emphasized by the  
8 plaintiffs, this water all gets commingled and that's exactly what happens  
9 when any of the waters allegedly coming from the depressions or potholes in  
10 the upper basin enter the drainage channels. They become either part of the  
11 water stored or discharged from the other upper basin chain of lakes.  
12 (absent evaporation, transpiration or absorption).

13 Mr. Olivier all but admits to this at T.T. Vol. 7, p.1610, l.24, 25, p.11, l.13. -

14 *Q. But that water gets intermingled before it gets to Devils Lake does it*  
15 *not?*

16 *A. Yeah. Water gets mixed with water I guess. Water is water.*

17 *Q. So would you agree with me that that water that's intermingled from*  
18 *the wetland structures is intermingled with these impacts that you've*  
19 *calculated for these various structures?*

20 *A. Yeah. To a certain extent it is.*

21 *Q. So would you agree then that you're double counting?*

22 *A. No I don't think I am.*

23 *Q. Despite the fact that the water is intermingled?*

24 *A. Correct.*

25 Olivier's acknowledgement of commingling and then denial of double  
26 counting was never adequately explained by him.

27 f. In determining the impact of Iverson Dam, Mr. Olivier does not take into  
28 account either the prior benefits of the presence of the dam over multiple  
29 decades before it was taken down, nor does he take into account the fact that  
30 the dam has been replaced to some measure and retains water behind at least  
31 two twelve inch stop logs.

32 g. Mr. Olivier testified that the possibly drained depressions identified in the  
33 West Report were the result of man made drains. In fact, the West Report  
34 indicates to the contrary. That is, that was not a requirement to identify the  
depressions as "possibly drained" depressions.

h. Mr. Olivier's demeanor on occasion (but not always) was of a witness who  
displayed an inclination to protect the integrity of his opinions by sacrificing  
scientific objectivity. An example of this is found at T.T., Vol. 7, p.1545-  
46. At times his demeanor was that of an advocate even though he testified  
he was not. The expert witness called by the defendants did not display this  
demeanor.

i. Mr. Olivier was uncertain as to the basis for certain numbers used in the  
calculations of impact of Lake Ibsen contained in Defendants' Exhibit 2242.

1 622. The defendants also claim that even if the plaintiffs have established probable cause that the  
2 defendants are not liable because any increased elevations experienced by Devils Lake were  
3 the results of an "act of God". The act of God claimed by the defendants is the climatic  
4 changes testified to by Professor Osborne and found by this court to have occurred,  
5 including the wet cycle identified by Professor Osborne in that climatic change experienced  
6 in the Devils Lake Basin.

7 In order to prevail on an act of God defense, the defendants must prove the following  
8 elements by a preponderance of the evidence, 1) that this climatic change was unprecedented  
9 and extraordinary, 2) that it could not have been reasonably anticipated and provided  
10 against, and 3) that it was the sole proximate cause of the damages suffered by the plaintiffs  
11 to their property. Hoge v. Burleigh County Water Management District 311 N.W. 2d 23, 29  
12 (N.D. 1981). As stated in Huber v. Oliver County, 1999 N.D. 220, ¶8, 602 N.W. 2d 710:

13 . . . To prevail on the act of God defense the defendant must establish the  
14 act of God was the sole proximate cause of the damage, and if the act of  
15 God and the fault or negligence of the defendant combine to produce the  
16 injury, the defendant is still liable.

17 I find that these elements have been established by the defendants by a preponderance of the  
18 evidence. This is based upon the following:

- 19 a. As previously explained in Findings of Fact 581-594 inclusive, the climatic  
20 changes causing the significantly increased water budget for the Devils Lake  
21 Basin, especially in the 1990's was unprecedented and extraordinary in that  
22 it was never before experienced in recorded history as opined by Professor  
23 Osborne. The evidence supports that determination.
- 24 b. These climatic changes could not have been anticipated or provided against.  
25 As already found and as explained by Professor Osborne, this climatic  
26 change as well as any climatic change cannot be predicted. They can only  
27 be determined after you are well into the change. It took significant time  
28 and effort for Professor Osborne to be able to make the analysis to reach this  
29 determination. In recorded history this change is unprecedented and  
30 extraordinary.

31 In planning the various projects it would be unreasonable to expect the  
32 design engineers or the defendant parties to anticipate such an unlikely  
33 event. Particularly, this is true in light of the fact that Devils Lake itself  
34 during the implementation of these projects was extremely low and dry and  
giving up land, not taking it. Further, even after projects were implemented  
there was no significant increase in elevations that alerted anyone to the  
kinds of concerns now existing until 1993.

Finally, and as previously noted, engineering standards did not require this  
kind of analysis. All that was required was to plan for a significant single

1 event within a 24 hour period during the prior ten years. There has never  
2 been any requirement in engineering standard from the evidence presented  
3 that required a project design to anticipate prolonged events as it relates to  
4 weather conditions and water projects. So, this climatic change could not  
have been anticipated or provided against.

- 5 c. This does constitute the sole proximate cause of the damages. In terms of  
6 the defendants being required to prove that this is the sole proximate cause  
7 of the damages suffered by the plaintiffs, all of the parties must appreciate  
8 and it is emphasized that we are speaking of *proximate cause*. This court  
9 has already determined that even with some additional volume of water  
10 discharged into Devils Lake because of the projects, (and that may have  
11 occurred with some projects and did occur with Channel A) that any  
12 volumes claimed by the plaintiffs have not been of sufficient volume to  
13 constitute a substantial part or cause in bringing about the damages or taking  
14 claimed by the plaintiffs. For these projects proximate cause has not been  
15 proved.

16 Because this court has determined through its findings that none of the  
17 projects for which the defendants were involved constituted a proximate  
18 cause of any damages or harm suffered by the plaintiffs, the finding that this  
19 was a proximate cause of the increased elevations experienced by the lake  
20 requires that it constitute the sole proximate cause.

21 In reaching this finding this court considered whether the defendants should be required to  
22 quantify the waters impacting Devils Lake due to this climatic change in proving this  
23 affirmative defense. Because the natural endpoint of the waters draining from the Devils  
24 Lake Basin (excluding Stump Lake) is the body of Devils Lake, I concluded it was not the  
25 defendants' burden. Instead, the burden to show a substantial part in bringing about the  
26 damages and taking claimed by the plaintiff due to the rise of Devils Lake remained with the  
27 plaintiffs even in the context of the affirmative defense and the burden on the defendants to  
28 prove it. To the extent this was an erroneous determination by this court, the defendants' act  
29 of God defense would fail.

- 30 623. The defendants have argued that in an inverse<sup>5</sup> condemnation action all of the government  
31 projects should be evaluated by a "*reasonableness standard*". When a reasonableness  
32 standard is applied it is a question of fact with multiple factors that may be considered.  
33 Locklin v. City of Lafayette 867 P2d 724, 744 (Cal. 1994). In its conclusions of law this  
34 court has concluded that this standard is not applicable to inverse condemnation claims. In  
addition, it has been determined for other reasons the plaintiffs claims will be denied.  
Therefore, no fact analysis will be provided on this issue by this court.

624. In the evidence presented and in their arguments, both the plaintiffs and the defendants would  
on occasion attempt to present the impact of their claims or present the lack of impact by

1 providing descriptions of what effect specified volumes of water would have on the water  
2 elevation rise of Devils Lake at particular elevations or years. As both sides have noted as  
3 has this court in previous findings, all of these waters commingled -- the water naturally  
4 flowing into Devils Lake over these years, the water already present in 1957, and all of the  
5 waters that plaintiffs claim discharged into the lake since 1957 due to these projects allegedly  
6 manipulating the natural process. Because of the result of commingling the only reasonable  
7 way to measure impact, if any, was by comparison and proportion. So, little consideration  
8 was given to these descriptions of elevation impact.

9 625. Based upon the totality of the findings set forth above, the plaintiffs have failed to meet their  
10 burden of proof that any of the defendants through the implemented and identified projects  
11 for which they were found to be involved resulted in a taking or damages to their  
12 properties.<sup>10</sup> Therefore all of the defendants are entitled to a judgment of dismissal with  
13 prejudice of the action against them for inverse condemnation and all other claims..

14 From these findings, this court now makes the following:

#### 15 CONCLUSIONS OF LAW

- 16 1. This court has jurisdiction over the subject matter and of the parties.  
17 2. Sufficient evidence has been established by a preponderance of the evidence that all of the  
18 party plaintiffs except as otherwise specified in the Findings or Conclusions have had their  
19 properties as identified in the Findings of Fact inundated or otherwise damaged by the waters  
20 of Devils Lake as the elevations of that water body increased.

- 21 3. Under North Dakota Constitution Article I, §16 it is provided that:

22 *Private property shall not be taken or damaged for public use without just*  
23 *compensation having been first made to, or paid into court for the owner, . . .*

24 This provision is intended to secure to owners not only the possession of their property, but  
25 also those rights which render possession valuable. Wild Rice River Estates, Inc. v. City of  
26 Fargo 2005 N.D. 193, ¶16, 705 N.W. 2d 850. The guarantee against the government's taking  
27 of private property for public use without just compensation is also protected under the Fifth  
28 Amendment to the United States Constitution and applicable to the states through the  
29 Fourteenth Amendment. Wild Rice River Estates, Inc. v. City of Fargo, supra at ¶12.

- 30 4. When the government has taken property without just compensation, the owner may maintain  
31 an action to recover just compensation for the property taken or the damage inflicted. Eck v.  
32 City of Bismarck 283 N.W. 2d 193, 197-98 (N.D. 1979); Donaldson v. City of Bismarck 3

33 <sup>10</sup> Within this decision, this trial court occasionally cited other findings of  
34 fact in support of a finding. That was not an exclusive reference. Other  
findings related to the same topic were also considered, as were all of the  
findings contained in this decision.

1 N.W. 2d 808, 817 (N.D. 1942).

2 5. N.D.C.C. 32-12-03 provides that any claim arising upon contract for the recovery of money  
3 can only be maintained against the state when the claim is first presented to the agency  
4 department board or commission to which the claim relates and is then refused. An inverse  
5 condemnation claim is considered to be a claim in contract to compensate for damages.  
6 Jamestown Plumbing and Heating Company v. City of Jamestown 164 N.W. 2d 355, 358  
7 (N.D. 1969; Maragos v. City of Minot 191 N.W. 2d 570, 572 (N.D. 1971). As concluded by  
8 this court in its Memoranda Decision and Order of November 19, 1999, an action for inverse  
9 condemnation does not require the filing of a claim as set out in N.D.C.C. 32-12-03. See  
10 Schilling v. Carl Township, Grant County 235 N.W. 126 (N.D. 1931); see also Minch v. City  
11 of Fargo 297 N.W. 2d 785, 789 (N.D. 1980); and Wolfe v. South Dakota Game, Fish and  
12 Park Department 554 N.W. 2d 531, 535 (S.D. 1996). As cited in Minch v. City of Fargo,  
13 *supra*, the right to bring an action for inverse condemnation is constitutionally based and  
14 exists for our citizens independent of any authority created by the enactment of N.D.C.C.  
15 Chap. 32-12.01. Article 1, Section 16 of our North Dakota Constitution is self executing.

16 6. When bringing an action for inverse condemnation, it is the plaintiff that has the burden of  
17 proof to prove that the defendant took or damaged the plaintiffs' property for a public use and  
18 that the public use was the proximate cause of the damages. Knutson v. City of Fargo 2006  
19 N.D. 97 ¶9, 714 N.W. 2d 44; Frank v. County of Mercer 186 N.W. 2d 439, 444-46 (N.D.  
20 1971). At p.10 of their reply brief the plaintiffs concede that the law relating to proximate  
21 cause in tort actions applies to proximate cause in inverse condemnation actions. The  
22 standard of proof required of the plaintiffs is a preponderance of the evidence. Frank v.  
23 Mercer County 187 N.W. 2d 439, 446 (N.D. 1971). A preponderance of the evidence is  
24 evidence more worthy of belief or brings a greater conviction of truth. Kraft v. State Board  
25 of Nursing 2001 N.D. 131, ¶21, 631 N.W. 2d 572.

26 There is no obligation on the defendants to resist the claims of the plaintiffs by offering  
27 countering evidence on the same issue using a similar methodology. They may do that. But,  
28 alternatively they may instead present evidence independently or through cross examination  
29 to cause the fact finder to question the reliability of the plaintiffs' evidence. Both methods  
30 may be pursued along with other strategies. In the end, the burden of proving the claims by  
31 the standard required is on the plaintiffs and never shifts. Helbling v. Helbling 541 N.W. 2d  
32 443, 445 (N.D. 1995). Consequently, the plaintiffs' argument that defendants had a duty to  
33 present evidence to refute the plaintiffs' expert testimony essentially establishing evidence  
34 that "the projects did not bring in more water" is incorrect. At best, such an argument only

1 suggests the weight that may be given particular evidence.

2 7. The initial determination of whether or not there has been a taking of or damage to private  
3 property is a question of law. Cady v. North Dakota Department of Transportation 472 N.W.  
4 2d 467, 469 (N.D. 1997). That determination, however, is made by the trial court  
5 establishing findings of facts on a takings claim. See Wild Rice River Estates v. City of  
6 Fargo, *supra* at ¶10.

7 8. It is recognized in North Dakota that to prove a claim for inverse condemnation, the property  
8 owner must prove that a public entity took or damaged his or her property for a public use  
9 and that public use was the proximate cause of the damages. Knutson v. City of Fargo 2006  
10 N.D. 1997 ¶9; 714 N.W. 2d 44. As stated in Frank v. Mercer County, *supra* at p.446, "the  
11 damage must be direct and proximate and not merely such as is possible, as may be  
12 conceived by the imagination, or such as affects merely the feelings of the property owner."  
13 In other words, it cannot be based upon speculation or conjecture. See also 4 Nickels on  
14 Eminent Domain §14.24.

15 9. As stated in Knutson v. City of Fargo, *supra* at ¶13:

16 *Under the North Dakota Constitution, inverse condemnation requires a*  
17 *public entity's taking or damaging an owner's property by some deliberate*  
18 *act, whether done intentionally, negligently, or innocently.*

19 10. Each of the defendants in this civil action for inverse condemnation are government entities  
20 as are their predecessors. The predecessors of the Ramsey County Water Resource District  
21 and its board are the Chain Lake Water Management District and the Sweetwater-Dry Lake  
22 Water Management District. The Ramsey County Water Resource District and its board is  
23 responsible and liable for any obligations owned or performed or acts done by these two  
24 entities.

25 11. The Hurricane Lake Joint Water Resource District and its board is a separate legal entity and  
26 political subdivision created pursuant to N.D.C.C. 61-16.1-11. Even though it is composed  
27 of other water resource districts in its membership, it is a separate political subdivision.  
28 Therefore, only the Hurricane Lake Water Resource District and not its member districts are  
29 responsible and liable for any obligations owed or performed or acts done under its authority.

30 12. Because the government may be obligated for their deliberate acts arising from an inverse  
31 condemnation claim that are of even an innocent character, a reasonableness test is not  
32 applicable to an inverse condemnation action in North Dakota. This court does not dispute  
33 that there is a "implied standard of reasonableness" when analyzing a government's  
34 application of water management statutes. See Eichhorn v. Waldo Township Board of  
Supervisors, County of Richland, 2006 N.D. 214, ¶24 723 N.W. 2d 112. However, the

1 application of that standard has limits. As noted by our Supreme Court, water management is  
2 not an exact science and the government's attempt to manage water does not require  
3 perfection. *Id.* This standard recognized by the North Dakota Supreme Court in Eichorn  
4 *supra*, was in the context of a landowner filing a petition for a writ of mandamus to compel a  
5 township to install larger culverts under a township road to eliminate flooding on his  
6 property. That holding does not state it is applicable to an inverse condemnation action. The  
7 same court has recognized liability from acts of inverse condemnation for even innocent acts.  
8 Knutson v. City of Fargo, supra. So, whether the actions of the different government entities  
9 in the identified government projects were reasonable, is not relevant. An implied standard  
10 of reasonableness does not apply to an inverse condemnation action.

- 11 13. Proximate cause is an essential element of an action for inverse condemnation. Knutson v.  
12 City of Fargo, supra; Frank v. County of Mercer, supra. Proximate cause is defined as:

13 . . . is a cause which, in natural and continuing sequence, produces the  
14 injury, and without which, the injury would not have occurred. It is a cause  
15 which has a substantial part in bringing about the injury either immediately  
16 or through events which follow one another.

16 N.D.J.I.C.-2.15 The cause must be one which in natural and continuous sequence, produces  
17 the injury and without which the injury would not have occurred. Beilke by Beilke v. Coryell  
18 524 N.W. 2d 607, 608 (N.D. 1994).

- 19 14. The plaintiffs have failed to present any evidence to weigh the claims against the defendants  
20 for projects described in Paragraph 356 of the Amended Complaint as "*Mauvais Coulee*  
21 *improvements above Lake Alice*" and "*Ring Channel on the north and east sides of Devils*  
22 *Lake*". So, all defendants are entitled to a dismissal of these claims against them on this  
23 basis as to these two identified projects.

- 24 15. Paragraph 356 of the Amended Complaint does not include any claim against the defendants  
25 regarding any projects on or relating to the St. Joe Coulee. Any claims relating to this are  
26 denied.

- 27 16. By the legal standards required and set out in Knutson v. City of Fargo, supra and Frank v.  
28 County of Mercer, supra and N.D.J.L.C. 2.15 the plaintiffs have failed to establish by a  
29 preponderance of the evidence that any of these projects and defendants were the cause in  
30 fact for the harm and damages incurred by the plaintiffs to their properties. This conclusion  
31 is based on an evaluation of each of the projects as well as their impact when considered in  
32 combination with each other through events following one another. This conclusion is based  
33 on the reasons set out in all of the findings contained in this decision.

- 34 17. As a component to the element of proximate cause, it must be proven by the plaintiffs by a

preponderance of the evidence that any harm or damages suffered by them were foreseeable or could have been reasonably anticipated by the defendants as the probable result of their conduct. Beilke by Beilke v. Coryell, *supra* at p.609. For reasons set forth in this court's Findings, this court has determined by that legal standard that none of the projects claimed by the plaintiffs to have contributed to the damages they have suffered were foreseeable or could have been reasonably anticipated by the defendants as a result of their conduct in initiating, developing and maintaining these projects.

18. As a component to the element of proximate cause, it must be proven by the plaintiffs by a preponderance of the evidence that the conduct of the defendants when considered individually and in combination with each other when appropriate, was a cause which had a substantial part in bringing about the damages or harm immediately or through happenings which follow one another. Beilke by Beilke v. Coryell *supra* at p.608-609. When analyzing this, this court agrees with the plaintiffs that as a matter of law they are not required to quantify the volume of water that discharged into Devils Lake because of these projects and which would not have otherwise occurred. However, the plaintiffs were required to present sufficient evidence as may be needed to allow this court to find from the facts that the government projects attributed to the defendants individually or in combination was a proximate cause for the damages claimed by the plaintiffs. Further, as a component of that, the plaintiffs were required to show that those government projects were a substantial part in bring about those damages immediately or through events following one another. See Beilke by Beilke v. Coryell *supra* at p.609. The plaintiffs did not have to show that it was the only proximate cause. *Id.*

The factual circumstances of this case as set out in the findings required that the claims be quantified in order to allow this court to evaluate the evidence and apply this to the legal standard. Without that, the remaining evidence in the record was not sufficiently persuasive or adequate for this court to make proper findings supported by the evidence. The factual circumstances presented to this court as the trier of fact as it relates to the increased water elevations experienced in Devils Lake is unique. As already found and which is uncontested, Devils Lake is the natural end point for all of the waters that drain from the Devils Lake Basin other than the Stump Lake watershed sub-basin. Therefore, (and as found) unless the water within the Devils Lake Basin is otherwise accounted for by evaporation; remains in storage in other Devils Lake Basin depressions, potholes, wetlands, or lakes; is lost through transpiration; or is lost through absorption into the soil, these waters will otherwise find themselves discharging into Devils Lake. As important, all of the water that allegedly caused

1 harm or damage and all the other water commingled. To determine if these projects were a  
2 substantial part in bringing about the damages claimed by the plaintiffs, the only reasonable  
3 evidentiary analysis required a comparison of the water volume that discharged into the lake  
4 due to the allegedly adverse impacts from these projects and all the waters that discharged  
5 into Devils Lake. In addition, it will then be subject to evaporation or other loss and this  
6 needs to be considered and quantified in some manner.

7 Further, as to channel activities, restoring water course channels so as to return them to a  
8 satisfactory and useful condition is lawful. See N.D.C.C. 61-21-01-02. So, when a channel  
9 improvement is subjected to an inverse condemnation claim, this must be considered.  
10 Clearing out a channel to its earlier condition causes no taking to the downstream land  
11 owner. On the other hand, a channel improvement which involves more than a clean out may  
12 contribute additional and significant water volume of such magnitude to be a substantial part  
13 in bringing about that damage or harm and may be a taking. This also makes quantifying the  
14 claim more important in the fact finding process.

15 Although this court never expected an exact quantification, some quantified amount was  
16 required by the facts simply because of the natural conditions of drainage existing in the  
17 Devils Lake Basin.

18 This court found that some of the channel improvement projects may have caused or  
19 increased the potential to cause some volume of water to discharge into Devils Lake that  
20 would not have otherwise done so. Because a quantified volume was not provided by the  
21 plaintiffs it would be pure speculation and conjecture for this court in its fact-finding process  
22 to attach any estimate of these amounts. The evidence or lack thereof was the driving force  
23 for this court to find the evidence insufficient that any waters that may have been contributed  
24 were a substantial part in bringing about any damages or taking claimed by the plaintiffs.  
25 This in turn results in the same conclusion of law that this evidence did not meet the legal  
26 standard.

27 19. As to some of the projects, some attempt has been made to quantify their impact. For reasons  
28 set forth in the Findings, the plaintiffs have failed to prove these claims by a preponderance  
29 of the evidence. They have not proven their claims as it relates to the following projects:

- 30 a. The Hurricane Lake outlet project
- 31 b; Lake Alice outlet structure
- 32 c. Lake Irvine outlet structure
- 33 d. Sweetwater-Morrison Lakes outlet structure
- 34 e. Dry Lake (Channel A) outlet structure and channel

1 f. Lake Ibsen outlet structure

2 g. Impact of wetlands drainage

3 The plaintiffs were able to quantify the impact they believe these projects had on the  
4 additional waters allegedly discharging into Devils Lake over the years of the existence of  
5 these projects. These claimed impacts were found to be unreliable. Even had they been  
6 reliable, the impacts for each of them were insufficient to constitute a substantial part in  
7 bringing about any damages or taking claimed by the plaintiffs as the waters increased in  
8 Devils Lake and inundated their properties or otherwise damaged them. This conclusion is  
9 based on a consideration of each of these projects as well as considering the claimed impact  
10 of these projects in consideration with each other as events and projects followed one  
11 another.

12 20. As it relates to the non-quantified projects claimed by the plaintiffs to have contributed to the  
13 damage of their properties, there was also insufficient evidence to allow this court to find or  
14 conclude that any amounts of water that discharged into Devils Lake because of these  
15 projects would have constituted a substantial part in bringing about any damages or taking  
16 claimed by the plaintiffs as to their properties. To reach such a conclusion asserted by the  
17 plaintiffs would have required speculation and conjecture from the evidence in the record.  
18 This conclusion is based on a consideration of each of these projects as well as considering  
19 the claimed impacts of each of these projects in combination with each other as events and  
20 the projects followed one another.

21 21. An inverse condemnation claim under Article One, §16 of the North Dakota Constitution  
22 requires no showing of fault or negligence. Undlin v. City of Surrey 262 N.W. 2d 742, 746  
23 (N.D. 1978). Consequently, the government defendants are subject to absolute liability as  
24 that constitutes liability without fault or negligence. Day v. General Motors Corporation 345  
25 N.W. 2d 349, 353 (N.D. 1984).

26 N.D.C.C. 32-03.2-02 provides that,

27 *"... When two or more parties are found to have contributed to the injury,*  
28 *the liability of each party is several only, and is not joint, and each party is*  
29 *liable only for the amount of damages attributable to the percentage of fault*  
30 *of that party, except that any persons who act in concert in committing a*  
31 *tortuous act or aid or encourage the act, or ratifies or adopts the act for*  
32 *their benefit are jointly liable for all damages attributable to their combined*  
33 *percentage of fault. ..."*

34 N.D.C.C. 32-03.2-02 also specifies that the liability for fault set out as provided above also  
applies for fault arising from absolute liability. *Id.* Consequently, as a general rule a party  
found liable for damages arising out of an inverse condemnation claim is subject to several

1 liability only and not joint and several liability.

2 22. The exception provided in N.D.C.C. 32-03.2-02 that imposes joint and several liability when  
3 parties act in concert is not an exception that applies to an inverse condemnation action  
4 pursuant to that statute. That is because the statute only gives that exception to tortuous acts.  
5 An inverse condemnation claim is one that arise out of contract. See Maragos v. City of  
6 Minot 191 N.W. 2d 570, 572 (N.D. 1971). Pursuant to Lang v. Wonneberg 455 N.W. 2d  
7 832, 838 (N.D. 1990) an additional exception to the several liability requirement set forth at  
8 N.D.C.C. 32-03.2-02 is set out in Lang v. Wonneberg by this court's analysis. In Lang v.  
9 Wonneberg supra, the Court cited Section 433A of the Restatement (2d) of Torts (1965)  
10 which states the following:

11 *Section 433A of the Restatement (2) of Torts (1965) states that damages for*  
12 *harm are to be apportioned among two or more causes only where there are*  
13 *distinct harms or there is a reasonable basis for determining the*  
14 *contribution of each cause to a single harm.*

15 In its Memoranda Decision and Order Granting in Part and Denying in Part, Defendant's  
16 Motion for Partial Summary Judgment and dated February 8, 2006 this trial court stated the  
17 following:

18 *The harm to the plaintiffs' property in this case is not indisputedly*  
19 *"distinct" and it is an evidentiary issue whether there is a "reasonable*  
20 *basis" for determining the contribution of each cause in a case such as this.*  
21 *See Thorson v. City of Minot, 153 N.W. 2d 754 (N.D. 1967).*

22 Because it addresses the issue of apportionment of cause or fault, this trial court concluded it  
23 was applicable to apportionment of causation and damages in an inverse condemnation  
24 action.

25 This court concludes as a matter of law that the harm suffered by the plaintiffs as a result of  
26 the increased water elevations experienced on Devils Lake is not an undisputedly distinct  
27 harm. As all the parties have conceded, all of the waters that have been discharged into  
28 Devils Lake regardless of whether they have done so due to the claimed impact of the  
29 identified projects or otherwise, have commingled. However, as this court specifically stated  
30 in its decision as set forth above it is *"an evidentiary issue whether there is a reasonable*  
31 *basis for determining the contribution of each claimed cause in a case such as this."*  
32 (Decision of court dated February 8, 2006). In its February 8, 2006 decision this court also  
33 acknowledged that pursuant to Section 433B of the Restatement (2nd) of Torts (1965) that  
34 the burden of proof as to the appropriate apportionment is placed on the party seeking to limit  
that parties' liability on the grounds that the harm is capable of apportionment. See Section  
433 B Restatement 2nd of Torts (1965).

1 23. Although the burden is on the defendants as the party seeking to apportion any harm, the  
2 evidence of that apportionment does not need to come from their witnesses. In fact, as it  
3 relates to certain projects, specifically the Hurricane Lake outlet structure, Lake Alice outlet  
4 structure, Lake Irvine outlet structure, Sweetwater/Morrison Lakes outlet structure, Dry Lake  
5 (Channel A) outlet structure and the Lake Ibsen outlet structure, quantified amounts have  
6 been attributed to these projects. The waters claimed by those projects that have allegedly  
7 discharged into Devils Lake can be compared to each other and towards the total volumes  
8 discharged into Devils Lake to compare and therefore apportion. This is a reasonable method  
9 of apportionment<sup>11</sup>, had liability been proven.

10 24. Although the plaintiffs have quantified their claims regarding the alleged impact from  
11 wetlands drainage due to the identified projects, apportionment of any impact between the  
12 government projects was not established. That burden to do so would have been on the  
13 defendants. The plaintiffs state in their initial post trial brief at p.126 that, *"Now that the*  
14 *plaintiffs have satisfied their initial burden of showing the government projects contributed*  
15 *more water to Devils Lake, defendants have the burden of apportionment, and thus the*  
16 *burden to show exactly what harm would have occurred to plaintiffs flooded/damaged*  
17 *property by way of any other causes."* The burden of apportionment was not on the  
18 defendants in regards to other causes, but in regards to the multiple causes which the  
19 plaintiffs claimed came from the government projects. As stated before, as to the projects  
20 previously identified, that apportionment has been reasonably established by the facts of the  
21 case.

22 25. Apportionment between the defendants for the other projects, the channel improvements and  
23 wetland drainage, have not been capable of reasonable apportionment from the evidence  
24 presented. No argument for apportionment was made. Therefore, these claims would subject  
25 the defendants to joint and several liability. However, because of the court's other findings  
26 and conclusions resulting in no liability, this is not a surviving issue.

27 26. In order to prevail on an act of God affirmative defense, the defendants are required to  
28 establish the following elements, 1) that the event presented as the act of God, in this case the  
29 climatic change and the wet cycle contained in it was unprecedented and extraordinary, 2)  
30 that it could not have been reasonably anticipated and provided against, and 3) that it was the

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31 <sup>11</sup> Another method that may have allowed for reasonable apportionment would have  
32 been to allocate any harm or damages found against the square miles  
33 attributable to any water resource district and assign that to any projects  
34 and/or defendants involved with those projects. However, that was not  
suggested by any of the parties and the apportionment set forth above is more  
accurate in any event and was argued in the case. Also, the methodology would  
have not considered the state defendants.

sole proximate cause of the damages suffered by the plaintiffs to their property. Hoge v. Burleigh County Water Management District 311 N.W. 2d 23, 29 (N.D. 1981). The requirement that the act of God be the sole proximate cause of the plaintiffs damages was emphasized in Huber v. Oliver County 1999 N.D. 220, ¶8, 602 N.W. 2d 710 where the court stated:

*... To prevail on the act of God defense the defendant must establish the act of God was the sole proximate cause of the damage, and if the act of God and the fault or negligence of the defendant combined to produce the injury, the defendant is still liable.*

The standard of proof in respect to an act of God defense is one of a fair preponderance of the evidence. Soules v. Northern Pacific Railroad Company 157 N.W. 823, 834 (N.D. 1916).

27. What constitutes an extraordinary event may be best explained by how the North Dakota Supreme Court explained what constituted an extraordinary flood in Soules et al v. Northern Pacific Railroad Company *supra* at p.830. The court stated that "extraordinary floods" are:

*Such floods that are of such unusual occurrence as could not have been foreseen by men of ordinary experience and ordinary prudence. Ordinary floods are those the occurrences of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen.*

Gulf C. and S. F. Ry. Co. v. Pool, 70 Tex. 713, 8 S.W. 535; 3 Words and Phrases §2628.

Further, a government entity is not required to anticipate acts of God but only those things that ordinary prudence would indicate might reasonably happen. Frank v. County of Mercer 186 N.W. 2d 439 (N.D. 1971). As stated in Dempsey v. City of Souris 279 N.W. 2d 418, 420 (N.D. 1979) it was held in citing Frank v. County of Mercer 186 N.W. 2d 439, 443 (N.D. 1971) that:

*In defining an act of God as being an extraordinary or unprecedented act, this court held, in Soules v. Northern Pac. Ry. Co., 34 N.D. 7, 157 N.W. 823, 824 (1916), in paragraph 6 and 7 of the syllabus: "6. Extraordinary or unprecedented floods are floods which are of such unusual occurrence that they could not have been foreseen by men of ordinary experience and prudence. Ordinary floods are those, the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen."*

*"7. In passing upon what is or what is not an extraordinary flood or whether it should have been anticipated and provided against, the question to be decided is "considering the rains of the past, the topographical and climatic conditions of the region and the nature of the drainage basin as to the perviousness of the soil, the presence or absence of trees or herbage which would tend to increase or prevent the rapid running off of the water,*

1           *would or should a reasonably prudent man have foreseen the danger and*  
2           *provided against it?" ' "*

3           The climate change or shift and the wet cycle attached to it were extraordinary and  
4           unprecedented by the legal standard previously stated.

- 5           28. The act of God affirmative defense also requires that the evidence supports a finding that the  
6           event could not have been reasonably anticipated or provided against. Bases on evidence in  
7           the record this court has made that finding. It is this court's conclusion that in considering  
8           the totality of circumstances and the climate changes experienced by those living in the  
9           Devils Lake Basin and also by the defendants over the decades and especially in the 1990's  
10          and after, and the nature of the projects and the professional engineering standards and  
11          technologies in existence, the event was not one that could be reasonably anticipated and  
12          provided against.

13          In reaching this conclusion, the law does not limit itself in the scope of what constitutes an  
14          event. That is driven by the circumstances and the legal standard cited above. So, the law  
15          does not limit the event to a single storm event. That may well constitute an event  
16          contemplated within the act of God affirmative defense. But, a series of storm events or a  
17          climatic shift or change may also constitute an event for the purposes of this affirmative  
18          defense.

- 19          29. Absent evidence that the dramatic climate shift or change, and the resulting climatic  
20          conditions was the sole proximate cause of the increased water elevations experienced on  
21          Devils Lake from 1993 forward, the defendants' act of God affirmative defense fails. See  
22          Hoge v. Burleigh County Water Management District 311 N.W. 2d 23, 29 (N.D. 1981). This  
23          court through its findings has already determined that none of the projects identified by the  
24          plaintiffs in their amended complaint and for which this court has found one or more of the  
25          defendants responsible, constituted a proximate cause of the increased elevations in Devils  
26          Lake. On the other hand, this court has found that the dramatic shift in the climatic  
27          conditions of the Devils Lake Basin region including the wet cycle within it, was a proximate  
28          cause for the increased water elevations experienced by Devils Lake which in turn caused  
29          damages and harm to the properties of the plaintiffs. Therefore, it constitutes the sole  
30          proximate cause of the damages and harm incurred by these plaintiffs as found by this court.

- 31          30. Because this court has found that all three elements of the act of God defense have been  
32          proven by the defendants by a preponderance of the evidence, this would serve as an  
33          affirmative defense precluding the defendants from liability to the plaintiffs had this court  
34          determined that any of the government projects was a proximate cause of the damages or  
            taking claimed by the plaintiffs.

31. As it relates to the reasonableness test for inverse condemnation actions relating to water management projects, it has been stated as set forth in Locklin v. City of Lafayette 867 P.2d 724, 749 (Cal. 1994) that:

*The issue of reasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused. The foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter. [Citations omitted] It is properly a consideration in land development problems whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters. The gravity of harm is a seriousness from an objective viewpoint, while the utility of conduct is meritoriousness from the same viewpoint. [Citations omitted] If the weight is on the side of him who alters the natural water course, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic cost incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. Id at p.744. Further as noted in Locklin inverse condemnation liability for damages caused by drainage of surface waters into or alteration of a natural water course is limited to situations in which the public entity's unreasonable conduct constitutes a substantial cause of the damage suffered by property owners. Id at 750.*

Notwithstanding this California citation and other citations offered by the defendants, this court continues to conclude that in North Dakota a "reasonableness" test is not a component in evaluating inverse condemnation claims.

32. The state has cited 101 Ranch v. United States of America 714 F.Supp. 1005 (USDCT 1988) as well as Anderson v. United States 174 F.Supp. 945 (Ct.Cl. 1959) for certain facts contained in those cases found by those trial courts. Under certain circumstances a trial court may take judicial notice of the factual findings and legal rulings made by another court. See 29 AmJur 2d Evidence §139. However, before such judicial notice is given appropriate notice should be provided to the other litigants. See *Id* at Section 38.

Having considered that the citation of these facts through these cases cited above of 101 Ranch and Anderson were not offered at trial and only through the post trial briefs, this court is not satisfied that sufficient notice has been provided to allow the plaintiffs to respond to them in an evidentiary manner. Therefore, the citations to these cases and the facts contained in them were not considered by this court in reaching its findings or decision.

33. A government is not liable under an inverse condemnation claim when its only act is to issue a permit relating to in this case a water project. See R. Bargmann v. State, Department of

1 Roads, et al 600 N.W. 2d 797, 805 (Neb. 1999). However, to the extent that the government  
2 entities, including the State Water Commission and the State Engineer participated in the  
3 design, funding and some degree of control over the construction and maintenance of the  
4 project once completed it may be subject to liability. *Id.* In its finding this court assigned  
5 responsibility and potential liability to one or more of the named defendants, including the  
6 state defendants and if their involvement was more than the issuing of permits. However, it  
7 also determined that none of the defendants were liable for any damages or harm claimed by  
8 the plaintiffs to their properties. So, this is no longer a surviving fact or legal issue.

- 9 34. It has been found by the facts set forth in this decision that the temporary impairment of  
10 James Wang's access to his property was not a taking without just compensation by any  
11 government entity. When government impairs access to private property adjoining a public  
12 highway the proper test for determining whether there is a taking or damages is the  
13 reasonableness of the access remaining. Boehm v. Backes 493 N.W. 2d 671, 674 (1992). As  
14 the court stated there:

15 *In situations where restrictions . . . have been imposed upon the access of*  
16 *abutting owners, the question becomes one of whether or not, under the*  
17 *existing facts and circumstances, a reasonable means of access remains. If*  
18 *the abutter has free and convenient access to his property, and its means of*  
19 *ingress and egress are not substantially interfered with, he has no cause of*  
20 *complaint. Id.*

21 For the short duration of time that his only access was by water it was reasonable for James  
22 Wang to access his property by boat. It is not uncommon for lake home owners to have their  
23 property on islands. More significantly, it was of a short duration and thereafter he had full  
24 access by highway. On this basis, the claim is subject to dismissal.

- 25 35. Absent evidence of a long term lease interest in any of the property that is subject to this  
26 claim, a taking by inverse condemnation does not act to terminate an at will lease and would  
27 not constitute any breach by the lessor of a general covenant to the lessee of quiet enjoyment.  
28 This is because the user of this property may be removed from the property and lose its  
29 enjoyment at will. See 26 AmJur 2d §232 at p.623 and 625 and §94 at p.506-7. Edward  
30 Brown and George A. Brown, Jr. failed to establish an ownership interest in property  
31 described in Findings of Fact Number 53. From the evidence, the only lease agreement that  
32 they possessed (which was with their wives) was one *at will*. Consequently, these plaintiffs  
33 have failed to show sufficient facts to show that they have such property interest in the  
34 property for which they make their claim that allows them to pursue an inverse condemnation  
action. That claim by them is dismissed on these grounds also.

36. Certain claims have been challenged by the defendants as not having been brought within the


appropriate statute of limitations. In an earlier decision dated April 1, 2005 this court granted partial summary judgment to the defendants determining that some of the plaintiffs failed to bring their claim within the appropriate statute of limitations. A plaintiffs' action accrues based upon the discovery rule and begins to run when the plaintiff knows, or with reasonable diligence should know of 1) the injury, 2) its cause, and 3) the defendants' possible negligence. Based upon the findings of facts made by this court it has determined that from this factual dispute these plaintiffs have brought their claim within the appropriate statute of limitations; Lyle and Mavis Huffman as to the property they have claimed was damaged; the 5.9 acres as found by the court to constitute the claim of Jan Shelver; Daniel M. and Doreen Webster for properties within their claims; Ronald D. and Elaine F. Heisler's property for which they have sought claims.

37. Without proof of any damages or taking, no claim for inverse condemnation can prevail. Certain claims of the plaintiffs are dismissed because those particular plaintiffs have failed to establish that particular parcels of property suffered damages. These include the claims of the following plaintiffs as to particular property set forth in the findings: Section 8 property of T.B.H. Farms; all of the claims of Lyle and Mavis Huffman except for Lot 1, Section 2 - T152 R67 in Benson County; the property of Rick A. Schwab which this court found was not flooded or damages; the property of Karen and Kathleen Konzak described as SW 1/4 of - 32-154-65 and Lots 2-3 in Sec. 5 - T154-R65; the property of Reginal K. and Eileen Herman through Hermansdale Farm described as N 1/2 N.W. 1/4 and S.E. 1/4 of N.W. 1/4 Sec. 33 and N.E. 1/4 of N.E/1/4 of Sec. 32; that property by TBH farms in Sec. 8. Any claim for damages for lost income cannot be granted in an inverse condemnation action.
38. Plaintiffs have failed to show sufficient evidence to allow a fact finder to determine that the Creel Bay Dike or Levy was developed or otherwise maintained by one or more of the defendants. This claim is dismissed on that basis.
39. All of the properties claimed by Reginal K. and Eileen Herman in fact constitutes partnership property owned by Hermansdale Farm. Hermansdale Farm was not a plaintiff. However, the ownership interest in the partnership and therefore the land of Reginal K. and Eileen Herman is sufficient to allow them to retain their claim for damages in this action.
40. From the totality of the findings set out in this decision, the plaintiffs have failed to prove by a preponderance of the evidence their claims for inverse condemnation against any of the defendants for any of the government projects. Therefore, the plaintiffs are entitled to a judgment of dismissal with prejudice. It shall be so ordered. Based upon the foregoing;

1 **IT IS HEREBY ORDERED**

- 2 1. That Judgment of Dismissal with Prejudice shall be entered.  
3 2. That the defendants be awarded their costs and disbursements allowed by law.  
4 3. This shall constitute a final order.

5 Dated this 25th day of OCTOBER 2007.

6   
7 M. Richard Geiger  
8 District Court Judge

9 Pc: Gary Leistico, Attorney for Plaintiffs  
10 Matthew Sagsveen, Attorney for NDSWC, State Engineer  
11 Howard Swanson, Attorney for RCWRD, LRWRD  
12 Daniel Gaustad and  
13 Ronald Fisher, Attorneys for all other WRD's  
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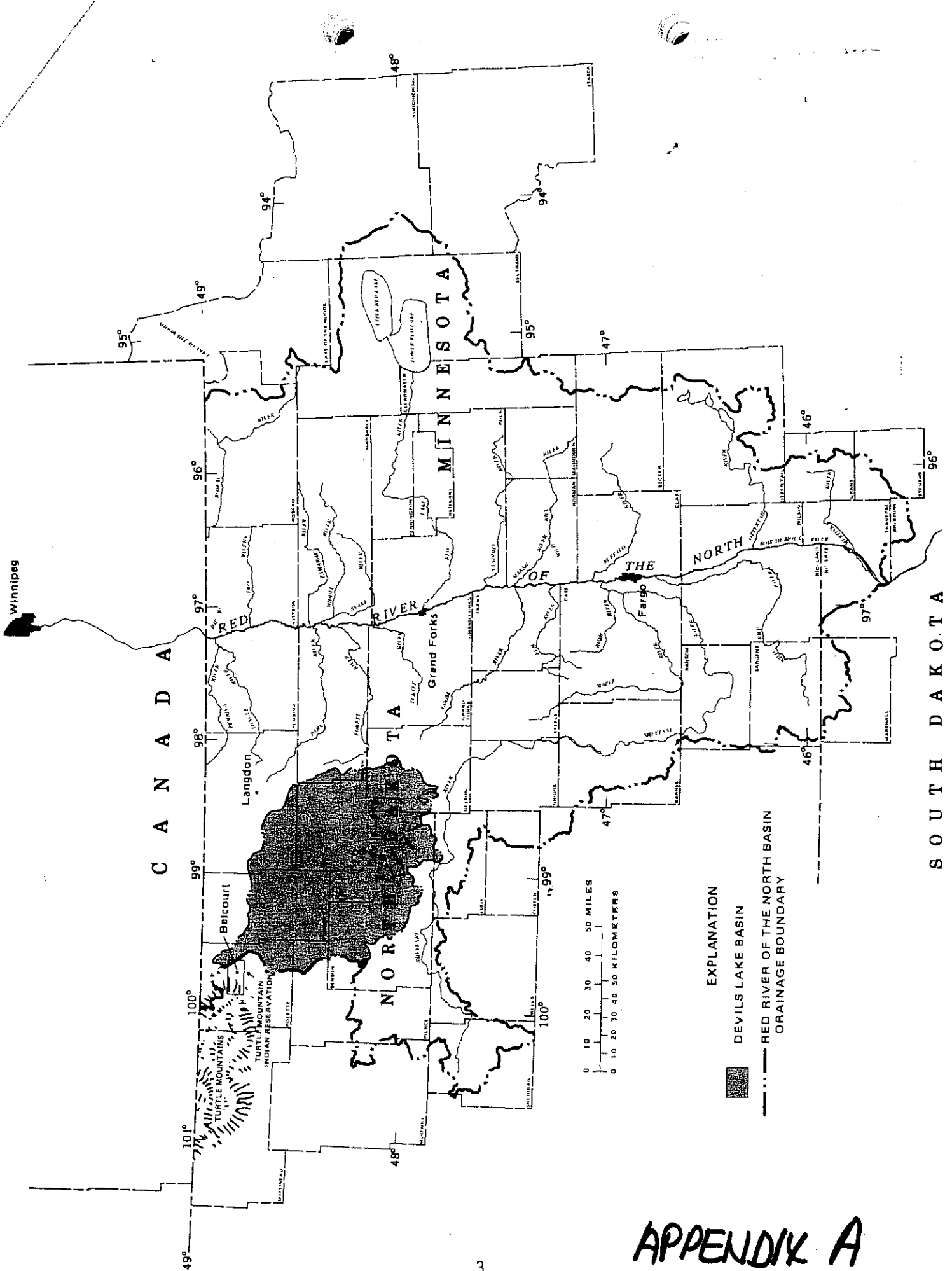


Figure 1.—Location of the Devils Lake basin. (Modified from Miller and Frink, 1984.)

APPENDIX A

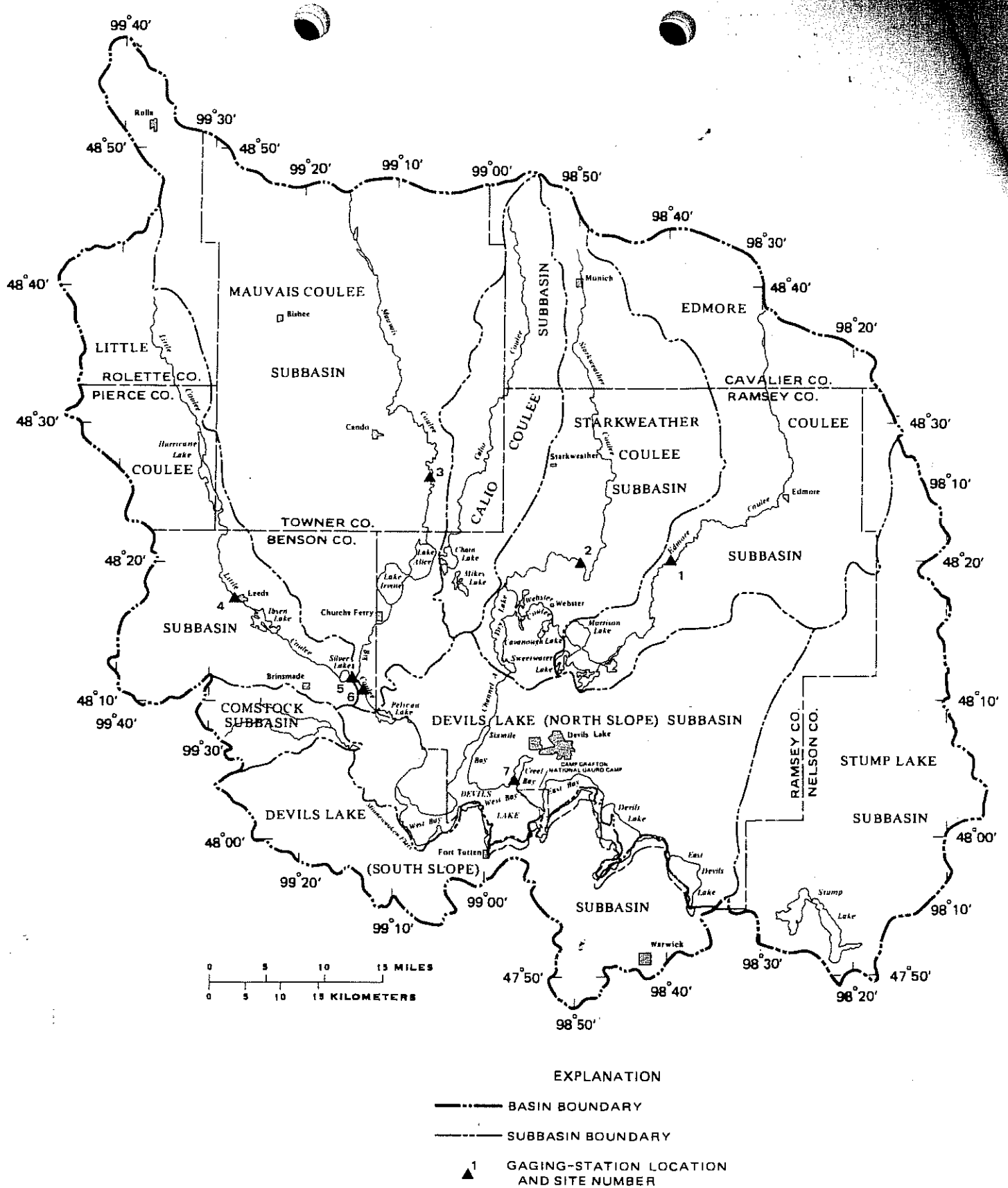


Figure 2.—Major subbasins and location of gaging stations.

APPENDIX B